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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1988

APRIL 3 THROUGH JUNE 12, 1989

FRANK D. WAGNER

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WILLIAM H. REHNQUIST, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.

RETIRED

WARREN E. BURGER, Chief Justice.
LEWIS F. POWELL, Jr., Associate Justice.

OFFICERS OF THE COURT

RICHARD L. THORNBURGH, Attorney General.
WILLIAM C. BRYSON, Acting Solicitor General.[1]
KENNETH W. STARR, Solicitor General.[2]
JOSEPH F. SPANIOL, Jr., Clerk.
FRANK D. WAGNER, Reporter of Decisions.
ALFRED WONG, Marshal.
SHELLEY L. DOWLING, Librarian.

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*For notes, see p. iv.

NOTES

[1] During the vacancy that had existed since the resignation of Solicitor General Fried effective January 20, 1989, Deputy Solicitor General Bryson was Acting Solicitor General. For the Court's expression of thanks to Mr. Bryson, see *post*, p. VII.

[2] The Honorable Kenneth W. Starr, of Virginia, was nominated by President Bush on January 31, 1989, to be Solicitor General; the nomination was confirmed by the Senate on May 18; he was commissioned on May 22, and took the oath of office on May 27. He was presented to the Court on May 30, 1989 (see *post*, p. VII).

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective February 18, 1988, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, ANTONIN SCALIA, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

February 18, 1988.

(For next previous allotment, and modifications, see 479 U. S., p. V, 483 U. S., pp. V, VI, and 484 U. S., pp. V, VI.)

PRESENTATION OF THE SOLICITOR GENERAL

SUPREME COURT OF THE UNITED STATES

TUESDAY, MAY 30, 1989

Present: CHIEF JUSTICE REHNQUIST, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY.

THE CHIEF JUSTICE said:

The Court at this time wishes to note for the record that William C. Bryson has been serving as Acting Solicitor General since January past. The Court recognizes the grave responsibility that has been placed upon you, Mr. Bryson, to represent the government of the United States before this Court. On behalf of my colleagues, I thank you for a job well done and you have our sincere appreciation. At this time the Court recognizes the Acting Solicitor General William C. Bryson, Jr.

Acting Solicitor General William C. Bryson presented the Honorable Kenneth W. Starr, Solicitor General of the United States, to the Court.

THE CHIEF JUSTICE said:

Mr. Solicitor General, the Court welcomes you to the performance of the important office that you have assumed, to represent the government of the United States before this Court. You follow in the footsteps of other outstanding Circuit Judges who have held your new office, including a member of this bench, Justice Marshall. Your commission will be duly recorded by the Clerk.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1988

UNITED STATES *v.* SOKOLOW

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87–1295. Argued January 10, 1989—Decided April 3, 1989

Drug Enforcement Administration (DEA) agents stopped respondent upon his arrival at Honolulu International Airport. The agents found 1,063 grams of cocaine in his carry-on luggage. When respondent was stopped, the agents knew, *inter alia*, that (1) he paid $2,100 for two round-trip plane tickets from a roll of $20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage. Respondent was indicted for possession with intent to distribute cocaine. The District Court denied his motion to suppress the evidence, finding that the stop was justified by a reasonable suspicion that he was engaged in criminal activity, as required by the Fourth Amendment. The Court of Appeals disagreed and reversed respondent's conviction, applying a two-part test for determining reasonable suspicion. First, ruled the court, at least one fact describing "ongoing criminal activity"—such as the use of an alias or evasive movement through an airport—was always necessary to support a reasonable-suspicion finding. Second, "probabilistic" facts describing "personal characteristics" of drug couriers—such as the cash payment for tickets, a short trip to a major source city for drugs, nervousness, type of attire, and unchecked luggage—were only relevant if there was evidence of "ongoing criminal activity" and the Government offered "[e]mpirical documentation" that the combination of facts at issue did not describe the behavior of "significant numbers of innocent persons." The Court of Appeals held the agents' stop impermissible, because there was no evidence of ongoing criminal behavior in this case.

Held: On the facts of this case, the DEA agents had a reasonable suspicion that respondent was transporting illegal drugs when they stopped him. Pp. 7–11.

(a) Under *Terry* v. *Ohio*, 392 U. S. 1, 30, the police can stop and briefly detain a person for investigative purposes if they have a reasonable suspicion supported by articulable facts that criminal activity "may be afoot," even if they lack probable cause under the Fourth Amendment. Reasonable suspicion entails some minimal level of objective justification for making a stop—that is, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause. P. 7.

(b) The Court of Appeals' two-part test creates unnecessary difficulty in dealing with one of the relatively simple concepts embodied in the Fourth Amendment. Under this Court's decisions, the totality of the circumstances must be evaluated to determine the probability, rather than the certainty, of criminal conduct. *United States* v. *Cortez*, 449 U. S. 411, 417. The Court of Appeals' test draws an unnecessarily sharp line between types of evidence, the probative value of which varies only in degree. While traveling under an alias or taking an evasive path through an airport may be highly probative, neither type of evidence has the sort of ironclad significance attributed to it by the Court of Appeals, because there are instances in which neither factor would reflect ongoing criminal activity. On the other hand, the test's "probabilistic" factors also have probative significance. Paying $2,100 in cash for airline tickets from a roll of $20 bills containing nearly twice that amount is not ordinary conduct for most business travelers or vacationers. The evidence that respondent was traveling under an alias, although not conclusive, was sufficient to warrant consideration. Of similar effect is the probability that few Honolulu residents travel for 20 hours to spend 48 hours in Miami during July. Thus, although each of these factors is not by itself proof of illegal conduct and is quite consistent with innocent travel, taken together, they amount to reasonable suspicion that criminal conduct was afoot. Pp. 7–10.

(c) The fact that the agents believed that respondent's behavior was consistent with one of the DEA's "drug courier profiles" does not alter this analysis, because the factors in question have evidentiary significance regardless of whether they are set forth in a "profile." P. 10.

(d) The reasonableness of the decision to stop does not, as respondent contends, turn upon whether the police used the least intrusive means

> available to verify or dispel their suspicions. Such a rule would unduly hamper the officers' ability to make on-the-spot decisions—here, respondent was about to enter a taxicab—and would require courts to indulge in unrealistic second-guessing. *Florida* v. *Royer*, 460 U. S. 491, 495, distinguished. Pp. 10–11.

831 F. 2d 1413, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 11.

Paul J. Larkin, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Acting Assistant Attorney General Dennis, Deputy Solicitor General Bryson*, and *Patty Merkamp Stemler.*

Robert P. Goldberg argued the cause and filed a brief for respondent.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Andrew Sokolow was stopped by Drug Enforcement Administration (DEA) agents upon his arrival at Honolulu International Airport. The agents found 1,063 grams of cocaine in his carry-on luggage. When respondent was stopped, the agents knew, *inter alia*, that (1) he paid $2,100 for two airplane tickets from a roll of $20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage. A divided panel of the United States Court of Appeals for the Ninth Circuit held that the DEA agents did not have a reasonable suspicion to stop respondent, as required by the Fourth Amendment. 831 F. 2d 1413 (1987). We take the contrary view.

This case involves a typical attempt to smuggle drugs through one of the Nation's airports.[1] On a Sunday in July 1984, respondent went to the United Airlines ticket counter at Honolulu Airport, where he purchased two round-trip tickets for a flight to Miami leaving later that day. The tickets were purchased in the names of "Andrew Kray" and "Janet Norian" and had open return dates. Respondent paid $2,100 for the tickets from a large roll of $20 bills, which appeared to contain a total of $4,000. He also gave the ticket agent his home telephone number. The ticket agent noticed that respondent seemed nervous; he was about 25 years old; he was dressed in a black jumpsuit and wore gold jewelry; and he was accompanied by a woman, who turned out to be Janet Norian. Neither respondent nor his companion checked any of their four pieces of luggage.

After the couple left for their flight, the ticket agent informed Officer John McCarthy of the Honolulu Police Department of respondent's cash purchase of tickets to Miami. Officer McCarthy determined that the telephone number respondent gave to the ticket agent was subscribed to a "Karl Herman," who resided at 348–A Royal Hawaiian Avenue in Honolulu. Unbeknownst to McCarthy (and later to the DEA agents), respondent was Herman's roommate. The ticket agent identified respondent's voice on the answering machine at Herman's number. Officer McCarthy was unable to find any listing under the name "Andrew Kray" in Hawaii. McCarthy subsequently learned that return reservations from Miami to Honolulu had been made in the names of Kray and Norian, with their arrival scheduled for July 25, three days after respondent and his companion had left. He also learned that Kray and Norian were scheduled to make stopovers in Denver and Los Angeles.

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[1] The facts in this case were developed at suppression hearings held in the District Court over three separate days. The parties also stipulated to certain facts.

On July 25, during the stopover in Los Angeles, DEA agents identified respondent. He "appeared to be very nervous and was looking all around the waiting area." App. 43–44. Later that day, at 6:30 p.m., respondent and Norian arrived in Honolulu. As before, they had not checked their luggage. Respondent was still wearing a black jumpsuit and gold jewelry. The couple proceeded directly to the street and tried to hail a cab, where Agent Richard Kempshall and three other DEA agents approached them. Kempshall displayed his credentials, grabbed respondent by the arm, and moved him back onto the sidewalk. Kempshall asked respondent for his airline ticket and identification; respondent said that he had neither. He told the agents that his name was "Sokolow," but that he was traveling under his mother's maiden name, "Kray."

Respondent and Norian were escorted to the DEA office at the airport. There, the couple's luggage was examined by "Donker," a narcotics detector dog, which alerted on respondent's brown shoulder bag. The agents arrested respondent. He was advised of his constitutional rights and declined to make any statements. The agents obtained a warrant to search the shoulder bag. They found no illicit drugs, but the bag did contain several suspicious documents indicating respondent's involvement in drug trafficking. The agents had Donker reexamine the remaining luggage, and this time the dog alerted on a medium-sized Louis Vuitton bag. By now, it was 9:30 p.m., too late for the agents to obtain a second warrant. They allowed respondent to leave for the night, but kept his luggage. The next morning, after a second dog confirmed Donker's alert, the agents obtained a warrant and found 1,063 grams of cocaine inside the bag.

Respondent was indicted for possession with the intent to distribute cocaine in violation of 21 U. S. C. § 841(a)(1). The United States District Court for Hawaii denied his motion to suppress the cocaine and other evidence seized from his luggage, finding that the DEA agents had a reasonable suspicion that he was involved in drug trafficking when they stopped him at the airport. Respondent then entered a conditional plea of guilty to the offense charged.

The United States Court of Appeals for the Ninth Circuit reversed respondent's conviction by a divided vote, holding that the DEA agents did not have a reasonable suspicion to justify the stop. 831 F. 2d, at 1423.[2] The majority divided the facts bearing on reasonable suspicion into two categories. In the first category, the majority placed facts describing "ongoing criminal activity," such as the use of an alias or evasive movement through an airport; the majority believed that at least one such factor was always needed to support a finding of reasonable suspicion. *Id.*, at 1419. In the second category, it placed facts describing "personal characteristics" of drug couriers, such as the cash payment for tickets, a short trip to a major source city for drugs, nervousness, type of attire, and unchecked luggage. *Id.*, at 1420. The majority believed that such characteristics, "shared by drug couriers and the public at large," were only relevant if there was evidence of ongoing criminal behavior and the Government offered "[e]mpirical documentation" that the combination of facts at issue did not describe the behavior of "significant numbers of innocent persons." *Ibid.* Applying this two-part test to the facts of this case, the majority found that there was no evidence of ongoing criminal behavior, and thus that the agents' stop was impermissible. The dissenting judge took the view that the majority's approach was "overly mechanistic" and "contrary to the case-by-case determination of reasonable articulable suspicion based on *all* the facts." *Id.*, at 1426.

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[2] In an earlier decision, the Court of Appeals also reversed the District Court, but on the basis of different reasoning. 808 F. 2d 1366, vacated, 831 F. 2d 1413 (1987). The Court of Appeals' second decision was issued after the Government petitioned for rehearing on the ground that the court had erred in considering each of the facts known to the agents separately rather than in terms of the totality of the circumstances.

We granted certiorari to review the decision of the Court of Appeals, 486 U. S. 1042 (1988), because of its serious implications for the enforcement of the federal narcotics laws. We now reverse.

The Court of Appeals held that the DEA agents seized respondent when they grabbed him by the arm and moved him back onto the sidewalk. 831 F. 2d, at 1416. The Government does not challenge that conclusion, and we assume—without deciding—that a stop occurred here. Our decision, then, turns on whether the agents had a reasonable suspicion that respondent was engaged in wrongdoing when they encountered him on the sidewalk. In *Terry* v. *Ohio*, 392 U. S. 1, 30 (1968), we held that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity "may be afoot," even if the officer lacks probable cause.

The officer, of course, must be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.'" *Id.*, at 27. The Fourth Amendment requires "some minimal level of objective justification" for making the stop. *INS* v. *Delgado*, 466 U. S. 210, 217 (1984). That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means "a fair probability that contraband or evidence of a crime will be found," *Illinois* v. *Gates*, 462 U. S. 213, 238 (1983), and the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause, see *United States* v. *Montoya de Hernandez*, 473 U. S. 531, 541, 544 (1985).

The concept of reasonable suspicion, like probable cause, is not "readily, or even usefully, reduced to a neat set of legal rules." *Gates*, *supra*, at 232. We think the Court of Appeals' effort to refine and elaborate the requirements of "reasonable suspicion" in this case creates unnecessary difficulty in dealing with one of the relatively simple concepts embodied in the Fourth Amendment. In evaluating the validity of a stop such as this, we must consider "the totality of the circumstances—the whole picture." *United States* v. *Cortez*, 449 U. S. 411, 417 (1981). As we said in *Cortez:*

> "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers." *Id.*, at 418.

The rule enunciated by the Court of Appeals, in which evidence available to an officer is divided into evidence of "ongoing criminal behavior," on the one hand, and "probabilistic" evidence, on the other, is not in keeping with the quoted statements from our decisions. It also seems to us to draw a sharp line between types of evidence, the probative value of which varies only in degree. The Court of Appeals classified evidence of traveling under an alias, or evidence that the suspect took an evasive or erratic path through an airport, as meeting the test for showing "ongoing criminal activity." But certainly instances are conceivable in which traveling under an alias would not reflect ongoing criminal activity: for example, a person who wished to travel to a hospital or clinic for an operation and wished to conceal that fact. One taking an evasive path through an airport might be seeking to avoid a confrontation with an angry acquaintance or with a creditor. This is not to say that each of these types of evidence is not highly probative, but they do not have the sort of ironclad significance attributed to them by the Court of Appeals.

On the other hand, the factors in this case that the Court of Appeals treated as merely "probabilistic" also have probative significance. Paying $2,100 in cash for two airplane tickets is out of the ordinary, and it is even more out of the ordinary to pay that sum from a roll of $20 bills containing nearly twice that amount of cash. Most business travelers, we feel confident, purchase airline tickets by credit card or check so as to have a record for tax or business purposes, and few vacationers carry with them thousands of dollars in $20 bills. We also think the agents had a reasonable ground to believe that respondent was traveling under an alias; the evidence was by no means conclusive, but it was sufficient to warrant consideration.[3] While a trip from Honolulu to Miami, standing alone, is not a cause for any sort of suspicion, here there was more: surely few residents of Honolulu travel from that city for 20 hours to spend 48 hours in Miami during the month of July.

Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion. See *Florida* v. *Royer*, 460 U. S. 491, 502 (1983) (opinion of WHITE, J.); *id.*, at 515–516 (BLACKMUN, J., dissenting); *id.*, at 523–524 (REHNQUIST, J., dissenting).[4] We said in *Reid* v. *Georgia*, 448 U. S. 438 (1980) *(per curiam)*, "there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." *Id.*, at 441.[5] Indeed, *Terry* itself involved "a series of acts, each of them perhaps innocent" if viewed separately, "but which taken together warranted further investigation." 392 U. S., at 22; see also *Cortez*, *supra*, at 417–419. We noted in *Gates*, 462 U. S., at 243–244, n. 13, that "innocent behavior will frequently provide the basis for a showing of probable cause," and that "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." That principle applies equally well to the reasonable suspicion inquiry.

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[3] Respondent also claims that the agents should have conducted a further inquiry to resolve the inconsistency between the name he gave the airline and the name, "Karl Herman," under which his telephone number was listed. Brief for Respondent 26. This argument avails respondent nothing; had the agents done further checking, they would have discovered not only that respondent was Herman's roommate but also that his name was "Sokolow" and not "Kray," the name listed on his ticket.

[4] In *Royer*, the police were aware, *inter alia*, that (1) Royer was traveling under an assumed name; (2) he paid for his ticket in cash with a number of small bills; (3) he was traveling from Miami to New York; (4) he put only his name and not an address on his checked luggage; and (5) he seemed nervous while walking through Miami airport. 460 U. S., at 493, n. 2, 502 (opinion of WHITE, J.).

[5] In *Reid*, the Court held that a DEA agent stopped the defendant without reasonable suspicion. At the time of the stop, the agent knew that (1) the defendant flew into Atlanta from Fort Lauderdale, a source city for cocaine; (2) he arrived early in the morning, when police activity was believed to be at a low ebb; (3) he did not check his luggage; and (4) the defendant

We do not agree with respondent that our analysis is somehow changed by the agents' belief that his behavior was consistent with one of the DEA's "drug courier profiles."[6] Brief for Respondent 14–21. A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a "profile" does not somehow detract from their evidentiary significance as seen by a trained agent.

Respondent also contends that the agents were obligated to use the least intrusive means available to verify or dispel their suspicions that he was smuggling narcotics. *Id.*, at 12–13, 21–23. In respondent's view, the agents should have simply approached and spoken with him, rather than forcibly detaining him. He points to the statement in *Florida* v. *Royer*, *supra*, at 500 (opinion of WHITE, J.), that "the in-

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and his companion appeared to be attempting to hide the fact that they were together. The Court held that the first three of these facts were not sufficient to supply reasonable suspicion, because they "describe a very large category of presumably innocent travelers," while the last fact was insufficient on the facts of that case to establish reasonable suspicion. 448 U. S., at 441.

[6] Agent Kempshall testified that respondent's behavior "had all the classic aspects of a drug courier." App. 59. Since 1974, the DEA has trained narcotics officers to identify drug smugglers on the basis of the sort of circumstantial evidence at issue here.

vestigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." That statement, however, was directed at the length of the investigative stop, not at whether the police had a less intrusive means to verify their suspicions before stopping Royer. The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques. Such a rule would unduly hamper the police's ability to make swift, on-the-spot decisions—here, respondent was about to get into a taxicab—and it would require courts to "indulge in 'unrealistic second-guessing.'" *Montoya de Hernandez*, 473 U. S., at 542, quoting *United States* v. *Sharpe*, 470 U. S. 675, 686, 687 (1985).

We hold that the agents had a reasonable basis to suspect that respondent was transporting illegal drugs on these facts. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with our decision.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Because the strongest advocates of Fourth Amendment rights are frequently criminals, it is easy to forget that our interpretations of such rights apply to the innocent and the guilty alike. *Illinois* v. *Gates*, 462 U. S. 213, 290 (1983) (BRENNAN, J., dissenting). In the present case, the chain of events set in motion when respondent Andrew Sokolow was stopped by Drug Enforcement Administration (DEA) agents at Honolulu International Airport led to the discovery of cocaine and, ultimately, to Sokolow's conviction for drug trafficking. But in sustaining this conviction on the ground that the agents reasonably suspected Sokolow of ongoing criminal activity, the Court diminishes the rights of *all* citizens "to be secure in their persons," U. S. Const., Amdt. 4, as they traverse the Nation's airports. Finding this result constitutionally impermissible, I dissent.

The Fourth Amendment cabins government's authority to intrude on personal privacy and security by requiring that searches and seizures usually be supported by a showing of probable cause. The reasonable-suspicion standard is a derivation of the probable-cause command, applicable only to those brief detentions which fall short of being full-scale searches and seizures and which are necessitated by law enforcement exigencies such as the need to stop ongoing crimes, to prevent imminent crimes, and to protect law enforcement officers in highly charged situations. *Terry* v. *Ohio*, 392 U. S. 1, 30 (1968). By requiring reasonable suspicion as a prerequisite to such seizures, the Fourth Amendment protects innocent persons from being subjected to "overbearing or harassing" police conduct carried out solely on the basis of imprecise stereotypes of what criminals look like, or on the basis of irrelevant personal characteristics such as race. *Id.*, at 14–15, and n. 11 (citation omitted).

To deter such egregious police behavior, we have held that a suspicion is not reasonable unless officers have based it on "specific and articulable facts." *Id.*, at 21; see also *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 880 (1975). It is not enough to suspect that an individual has committed crimes in the past, harbors unconsummated criminal designs, or has the propensity to commit crimes. On the contrary, before detaining an individual, law enforcement officers must reasonably suspect that he is engaged in, or poised to commit, a criminal act *at that moment.* See, *e. g.*, *Brown* v. *Texas*, 443 U. S. 47, 51 (1979) (to detain, officers must "have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity"); *Terry*, *supra*, at 30 (reasonable suspicion exists only where policeman reasonably concludes, *inter alia*, "that criminal activity may be afoot"). The rationale for permitting brief, warrantless seizures is, after all, that it is impractical to demand strict compliance with the Fourth Amendment's ordinary probable-cause requirement in the face of ongoing or imminent criminal activity demanding "swift action predicated upon the on-the-spot observations of the officer on the beat." *Terry, supra,* at 20. Observations raising suspicions of past criminality demand no such immediate action, but instead should appropriately trigger routine police investigation, which may ultimately generate sufficient information to blossom into probable cause.

Evaluated against this standard, the facts about Andrew Sokolow known to the DEA agents at the time they stopped him fall short of reasonably indicating that he was engaged at the time in criminal activity. It is highly significant that the DEA agents stopped Sokolow because he matched one of the DEA's "profiles" of a paradigmatic drug courier. In my view, a law enforcement officer's mechanistic application of a formula of personal and behavioral traits in deciding whom to detain can only dull the officer's ability and determination to make sensitive and fact-specific inferences "in light of his experience," *Terry, supra,* at 27, particularly in ambiguous or borderline cases. Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work of subjecting innocent individuals to unwarranted police harassment and detention. This risk is enhanced by the profile's "chameleon-like way of adapting to any particular set of observations." 831 F. 2d 1413, 1418 (CA9 1987). Compare, *e. g., United States* v. *Moore,* 675 F. 2d 802, 803 (CA6 1982) (suspect was first to deplane), cert. denied, 460 U. S. 1068 (1983), with *United States* v. *Mendenhall,* 446 U. S. 544, 564 (1980) (last to deplane), with *United States* v. *Buenaventura-Ariza,* 615 F. 2d 29, 31 (CA2 1980) (deplaned from middle); *United States* v. *Sullivan,* 625 F. 2d 9, 12 (CA4 1980) (one-way tickets), with *United States* v. *Craemer,* 555 F. 2d 594, 595 (CA6 1977) (round-trip tickets), with *United States* v. *McCaleb,* 552 F. 2d 717, 720 (CA6 1977) (nonstop flight), with *United States* v. *Sokolow,* 808 F. 2d 1366, 1370 (CA9), vacated, 831 F. 2d 1413

(1987) (case below) (changed planes); *Craemer*, *supra*, at 595 (no luggage), with *United States* v. *Sanford*, 658 F. 2d 342, 343 (CA5 1981) (gym bag), cert. denied, 455 U. S. 991 (1982), with *Sullivan*, *supra*, at 12 (new suitcases); *United States* v. *Smith*, 574 F. 2d 882, 883 (CA6 1978) (traveling alone), with *United States* v. *Fry*, 622 F. 2d 1218, 1219 (CA5 1980) (traveling with companion); *United States* v. *Andrews*, 600 F. 2d 563, 566 (CA6 1979) (acted nervously), cert. denied *sub nom. Brooks* v. *United States*, 444 U. S. 878 (1979), with *United States* v. *Himmelwright*, 551 F. 2d 991, 992 (CA5) (acted too calmly), cert. denied, 434 U. S. 902 (1977). In asserting that it is not "somehow" relevant that the agents who stopped Sokolow did so in reliance on a prefabricated profile of criminal characteristics, *ante*, at 10, the majority thus ducks serious issues relating to a questionable law enforcement practice, to address the validity of which we granted certiorari in this case.[1]

That the factors comprising the drug courier profile relied on in this case are especially dubious indices of ongoing criminal activity is underscored by *Reid* v. *Georgia*, 448 U. S. 438 (1980), a strikingly similar case. There, four facts, encoded in a drug courier profile, were alleged in support of the DEA's detention of a suspect at the Atlanta Airport. First, Reid had arrived from Fort Lauderdale, Florida, a source city for cocaine. Second, he arrived in the early morning, when law enforcement activity is diminished. Third, he and his companion appeared to have no luggage other than their shoulder bags. And fourth, he and his companion appeared to be trying to conceal the fact that they were traveling together. *Id.*, at 440–441.

This collection of facts, we held, was inadequate to support a finding of reasonable suspicion. All but the last of these facts, we observed, "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure." *Id.*, at 441. The sole fact that suggested criminal activity was that Reid "preceded another person and occasionally looked backward at him as they proceeded through the concourse." *Ibid.* This observation did not of itself provide a reasonable basis for suspecting wrongdoing, for inferring criminal activity from such evidence reflected no more than an "'inchoate and unparticularized suspicion or "hunch."'" *Ibid.*, quoting *Terry*, 392 U. S., at 27.[2]

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[1] Even if such profiles had reliable predictive value, their utility would be short lived, for drug couriers will adapt their behavior to sidestep detection from profile-focused officers.

The facts known to the DEA agents at the time they detained the traveler in this case are scarcely more suggestive of ongoing criminal activity than those in *Reid.* Unlike traveler Reid, who sought to conceal the fact that he was traveling with a companion, and who even attempted to run away after being approached by a DEA agent, 448 U. S., at 439, traveler Sokolow gave no indications of evasive activity. On the contrary, the sole behavioral detail about Sokolow noted by the DEA agents was that he was nervous. With news accounts proliferating of plane crashes, near collisions, and air terrorism, there are manifold and good reasons for being agitated while awaiting a flight, reasons that have nothing to do with one's involvement in a criminal endeavor.

The remaining circumstantial facts known about Sokolow, considered either singly or together, are scarcely indicative of criminal activity. Like the information disavowed in *Reid* as nonprobative, the fact that Sokolow took a brief trip to a resort city for which he brought only carry-on luggage also "describe[s] a very large category of presumably innocent travelers." *Id.*, at 441. That Sokolow embarked from Miami, "a source city for illicit drugs," *ante*, at 3, is no more suggestive of illegality; thousands of innocent persons travel from "source cities" every day and, judging from the DEA's testimony in past cases, nearly every major city in the country may be characterized as a source or distribution city. See, *e. g.*, *Buenaventura-Ariza*, 615 F. 2d, at 31, n. 5. That Sokolow had his phone listed in another person's name also does not support the majority's assertion that the DEA agents reasonably believed Sokolow was using an alias; it is commonplace to have one's phone registered in the name of a roommate, which, it later turned out, was precisely what Sokolow had done.[3] That Sokolow was dressed in a black jumpsuit and wore gold jewelry also provides no grounds for suspecting wrongdoing, the majority's repeated and unexplained allusions to Sokolow's style of dress notwithstanding. *Ante*, at 4, 5. For law enforcement officers to base a search, even in part, on a "pop" guess that persons dressed in a particular fashion are likely to commit crimes not only stretches the concept of reasonable suspicion beyond recognition, but also is inimical to the self-expression which the choice of wardrobe may provide.

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[2] Nor was *Reid* a close case: eight Members of the Court found the challenged detention insupportable, five of whom saw fit to dispose of the case by reversing the court below in a *per curiam* opinion. In a separate concurrence, Justice Powell, joined by Chief Justice Burger and JUSTICE BLACKMUN, agreed that "the fragmentary facts apparently relied on by the DEA agents" provided "no justification" for Reid's detention. 448 U. S., at 442, n. 1. Only then-JUSTICE REHNQUIST, the author of today's majority opinion, dissented, on the ground that the police conduct involved did not implicate Reid's constitutional rights. *Id.*, at 442.

Finally, that Sokolow paid for his tickets in cash indicates no imminent or ongoing criminal activity. The majority "feel[s] confident" that "[m]ost business travelers . . . purchase airline tickets by credit card or check." *Ante*, at 8. Why the majority confines its focus only to "business travelers" I do not know, but I would not so lightly infer ongoing crime from the use of legal tender. Making major cash purchases, while surely less common today, may simply reflect the traveler's aversion to, or inability to obtain, plastic money. Conceivably, a person who spends large amounts of cash may be trying to launder his proceeds from *past* criminal enterprises by converting them into goods and services. But, as I have noted, investigating completed episodes of crime goes beyond the appropriately limited purview of the brief, *Terry*-style seizure. Moreover, it is unreasonable to suggest that, had Sokolow left the airport, he would have been gone forever and thus immune from subsequent investigation. *Ante*, at 11. Sokolow, after all, had given the airline his phone number, and the DEA, having ascertained that it was indeed Sokolow's voice on the answering machine at that number, could have learned from that information where Sokolow resided.

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[3] That Sokolow was, in fact, using an alias was not known to the DEA agents until *after* they detained him. Thus, it cannot legitimately be considered as a basis for the seizure in this case.

The fact is that, unlike the taking of patently evasive action, *Florida* v. *Rodriguez*, 469 U. S. 1, 6 (1984), the use of an alias, *Florida* v. *Royer*, 460 U. S. 491, 502 (1983), the casing of a store, *Terry*, *supra*, at 6, or the provision of a reliable report from an informant that wrongdoing is imminent, *Illinois* v. *Gates*, 462 U. S., at 225–227, nothing about the characteristics shown by airport traveler Sokolow reasonably suggests that criminal activity is afoot. The majority's hasty conclusion to the contrary serves only to indicate its willingness, when drug crimes or antidrug policies are at issue, to give short shrift to constitutional rights. See, *e. g.*, *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 636 (1989) (MARSHALL, J., dissenting).[4] In requiring that seizures be based on at least some evidence of criminal conduct, 831 F. 2d, at 1419, the Court of Appeals was faithful to the Fourth Amendment principle that law enforcement officers must reasonably suspect a person of criminal activity before they can detain him. Because today's decision, though limited to its facts, *ante*, at 11, disobeys this important constitutional command, I dissent.

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[4] The majority also contends that it is not relevant that the DEA agents, in forcibly stopping Sokolow rather than simply speaking with him, did not "use the least intrusive means available." *Ante*, at 10. On the contrary, the manner in which a search is carried out—and particularly whether law enforcement officers have taken needlessly intrusive steps—is a highly important index of reasonableness under Fourth Amendment doctrine. See, *e. g.*, *Winston* v. *Lee*, 470 U. S. 753, 760–761 (1985).

Syllabus

CITY OF DALLAS ET AL. *v.* STANGLIN, INDIVIDUALLY AND DBA TWILIGHT SKATING RINK

CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FIFTH DISTRICT

No. 87–1848. Argued March 1, 1989—Decided April 3, 1989

For the express purpose of providing a place where teenagers can socialize with each other but not be subject to the potentially detrimental influences of older teenagers and adults, a Dallas ordinance authorizes the licensing of "Class E" dance halls, restricting admission thereto to persons between the ages of 14 and 18 and limiting their hours of operation. Respondent, whose roller-skating rink and Class E dance hall share a divided floorspace, filed suit in state court to enjoin the ordinance's age and hour restrictions, contending, *inter alia*, that they violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The trial court upheld the ordinance, but the Texas Court of Appeals struck down the ordinance's age restriction, holding that it violated the First Amendment associational rights of minors.

Held:

1. The ordinance does not infringe on the First Amendment right of association. Respondent's patrons, who may number as many as 1,000 per night, are not engaged in a form of "intimate association." Nor do the opportunities of adults and minors to dance with one another, which might be described as "associational" in common parlance, involve the sort of "expressive association" that the First Amendment has been held to protect. The teenagers who congregate are not members of any organized association, and most are strangers to one another. The dance hall admits all who pay the admission fee, and there is no suggestion that the patrons take positions on public questions or perform other similar activities. Moreover, the Constitution does not recognize a generalized right of "social association" that includes chance encounters in dance halls. *Griswold* v. *Connecticut*, 381 U. S. 479, 483, distinguished. Pp. 23–25.

2. The ordinance does not violate the Equal Protection Clause because there is a rational relationship between the age restriction for Class E dance halls and the city's interest in promoting the welfare of teenagers. Respondent's claims—that the ordinance does not meet the city's objectives because adults and teenagers can still associate with one another in places such as his skating rink and that there are other, less intrusive, alternatives to achieve the objectives—misapprehend the nature of

rational-basis scrutiny, the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause. Under this standard, a classification that has some reasonable basis does not offend the Constitution because it is imperfect. Here, the city could reasonably conclude that teenagers might be more susceptible to corrupting influences if permitted to frequent dance halls with older persons or that limiting dance-hall contacts between adults and teenagers would make less likely illicit or undesirable juvenile involvement with alcohol, illegal drugs, or promiscuous sex. While the city permits teenagers and adults to roller-skate together, skating involves less physical contact than dancing, a differentiation that need not be striking to survive rational-basis scrutiny. Pp. 25–28.

744 S. W. 2d 165, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post*, p. 28.

Craig Hopkins argued the cause for petitioners. With him on the briefs were *Analeslie Muncy* and *Kenneth C. Dippel.*

Daniel J. Sheehan, Jr., argued the cause and filed a brief for respondent.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner city of Dallas adopted an ordinance restricting admission to certain dance halls to persons between the ages of 14 and 18. Respondent, the owner of one of these "teen-age" dance halls, sued to contest the constitutional validity of the ordinance. The Texas Court of Appeals held that the ordinance violated the First Amendment right of persons between the ages of 14 and 18 to associate with persons out-

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*Briefs of *amici curiae* urging reversal were filed for the National Institute of Municipal Officers by *William I. Thornton, Jr., Frank B. Gummey III, William H. Taube, Roy D. Bates, Robert J. Alfton, James K. Baker, Robert J. Mangler, Neal E. McNeill, Dante R. Pellegrini, Clifford D. Pierce, Jr., Benjamin L. Brown,* and *Charles S. Rhyne;* and for the United States Conference of Mayors et al. by *Benna Ruth Solomon.*

side that age group. We now reverse, holding that the First Amendment secures no such right.

In 1985, in response to requests for dance halls open only to teenagers, the city of Dallas authorized the licensing of "Class E" dance halls.[1] The purpose of the ordinance was to provide a place where teenagers could socialize with each other, but not be subject to the potentially detrimental influences of older teenagers and young adults. The provision of the ordinance at issue here, Dallas City Code § 14–8.1 (1985), restricts the ages of admission to Class E dance halls to persons between the ages of 14 and 18.[2] This provision, as enacted, restricted admission to those between 14 and 17, but it was subsequently amended to include 18-year-olds. Parents, guardians, law enforcement, and dance-hall personnel are excepted from the ordinance's age restriction. The ordinance also limits the hours of operation of Class E dance halls to between 1 p.m. and midnight daily when school is not in session. § 14–5(d)(2).

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[1] Dallas also licenses Class A, B, and C dance halls, which differ in the number of days per week dancing is permitted; Class D is for dance instruction. Persons under 17 must be accompanied by a parent for admission to Class A, B, and C dance halls. Dallas City Code §§ 14–1, 14–8 (1985–1986). A dance-hall license is not needed if the dance is at any of the following locations: a private residence from which the general public is excluded; a place owned by the federal, state, or local government; a public or private elementary school, secondary school, college, or university; a place owned by a religious organization; or a private club. *Ibid.*

[2] Section 14–8.1 of the Dallas City Code provides:

"(a) No person under the age of 14 years or over the age of 18 years may enter a Class E dance hall.

"(b) A person commits an offense if he is over the age of 18 years and:

"(1) enters a Class E dance hall; or

"(2) for the purposes of gaining admittance into a Class E dance hall, he falsely represents himself to be:

"(A) of an age from 14 years through 18 years;

"(B) a licensee or an employee of the dance hall;

"(C) a parent or guardian of a person inside the dance hall;

"(D) a governmental employee in the performance of his duties.

"(c) A licensee or an employee of a Class E dance hall commits an offense if he knowingly allows a person to enter or remain on the premises of a dance hall who is:

"(1) under the age of 14 years; or

"(2) over the age of 18 years.

"(d) It is a defense to prosecution under Subsections (b)(1) and (c)(2) that the person is:

Respondent operates the Twilight Skating Rink in Dallas and obtained a license for a Class E dance hall. He divided the floor of his roller-skating rink into two sections with moveable plastic cones or pylons. On one side of the pylons, persons between the ages of 14 and 18 dance, while on the other side, persons of all ages skate to the same music—usually soul and "funk" music played by a disc jockey. No age or hour restrictions are applicable to the skating rink. Respondent does not serve alcohol on the premises, and security personnel are present. The Twilight does not have a selective admissions policy. It charges between $3.50 and $5 per person for admission to the dance hall and between $2.50 and $5 per person for admission to the skating rink. Most of the patrons are strangers to each other, and the establishment serves as many as 1,000 customers per night.

Respondent sued in the District Court of Dallas County to enjoin enforcement of the age and hour restrictions of the ordinance. He contended that the ordinance violated substantive due process and equal protection under the United States and Texas Constitutions, and that it unconstitutionally infringed the rights of persons between the ages of 14 and 17 (now 18) to associate with persons outside that age bracket.[3] The trial court upheld the ordinance, finding that it was ra-

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"(1) a licensee or employee of a dance hall;

"(2) a parent or guardian of a person inside the dance hall; or

"(3) a governmental employee in the performance of his duties."

[3] The Court of Appeals held that respondent had standing to assert the associational rights of the teenage patrons of his establishment. 744 S. W. 2d 165, 168 (1987). That issue has not been raised before us.

tionally related to the city's legitimate interest in ensuring the safety and welfare of children.

The Texas Court of Appeals upheld the ordinance's time restriction, but it struck down the age restriction. 744 S. W. 2d 165 (1987). The Court of Appeals held that the age restriction violated the First Amendment associational rights of minors. To support a restriction on the fundamental right of "social association," the court said that "the legislative body must show a compelling interest," and the regulation "must be accomplished by the least restrictive means." *Id.*, at 168. The court recognized the city's interest in "protect-[ing] minors from detrimental, corrupting influences," *ibid.*, but held that the "City's stated purposes . . . may be achieved in ways that are less intrusive on minors' freedom to associate," *id.*, at 169. The Court of Appeals stated that "[a] child's right of association may not be abridged simply on the premise that he 'might' associate with those who would persuade him into bad habits," and that "neither the activity of dancing *per se*, nor association of children aged fourteen through eighteen with persons of other ages in the context of dancing renders such children peculiarly vulnerable to the evils that defendant City seeks to prevent." *Ibid.* We granted certiorari, 488 U. S. 815 (1988), and now reverse.

The dispositive question in this case is the level of judicial "scrutiny" to be applied to the city's ordinance. Unless laws "create suspect classifications or impinge upon constitutionally protected rights," *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 40 (1973), it need only be shown that they bear "some rational relationship to a legitimate state purpose," *id.*, at 44. Respondent does not contend that dance-hall patrons are a "suspect classification," but he does urge that the ordinance in question interferes with associational rights of such patrons guaranteed by the First Amendment.

While the First Amendment does not in terms protect a "right of association," our cases have recognized that it embraces such a right in certain circumstances. In *Roberts* v. *United States Jaycees*, 468 U. S. 609 (1984), we noted two different sorts of "freedom of association" that are protected by the United States Constitution:

> "Our decisions have referred to constitutionally protected 'freedom of association' in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.*, at 617–618.

It is clear beyond cavil that dance-hall patrons, who may number 1,000 on any given night, are not engaged in the sort of "intimate human relationships" referred to in *Roberts*. The Texas Court of Appeals, however, thought that such patrons were engaged in a form of expressive activity that was protected by the First Amendment. We disagree.

The Dallas ordinance restricts attendance at Class E dance halls to minors between the ages of 14 and 18 and certain excepted adults. It thus limits the minors' ability to dance with adults who may not attend, and it limits the opportunity of such adults to dance with minors. These opportunities might be described as "associational" in common parlance, but they simply do not involve the sort of expressive association that the First Amendment has been held to protect. The hundreds of teenagers who congregate each night at this particular dance hall are not members of any organized association; they are patrons of the same business establishment.

Most are strangers to one another, and the dance hall admits all who are willing to pay the admission fee. There is no suggestion that these patrons "take positions on public questions" or perform any of the other similar activities described in *Board of Directors of Rotary International* v. *Rotary Club of Duarte*, 481 U. S. 537, 548 (1987).

The cases cited in *Roberts* recognize that "freedom of speech" means more than simply the right to talk and to write. It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment. Thus this activity qualifies neither as a form of "intimate association" nor as a form of "expressive association" as those terms were described in *Roberts*.

Unlike the Court of Appeals, we do not think the Constitution recognizes a generalized right of "social association" that includes chance encounters in dance halls. The Court of Appeals relied, mistakenly we think, on a statement from our opinion in *Griswold* v. *Connecticut*, 381 U. S. 479, 483 (1965), that "[t]he right to freely associate is not limited to 'political' assemblies, but includes those that 'pertain to the *social*, legal, and economic benefit' of our citizens." 744 S. W. 2d, at 168, quoting *Griswold* v. *Connecticut*, *supra*, at 483. But the quoted language from *Griswold* recognizes nothing more than that the right of expressive association extends to groups organized to engage in speech that does not pertain directly to politics.

The Dallas ordinance, therefore, implicates no suspect class and impinges on no constitutionally protected right. The question remaining is whether the classification engaged in by the city survives "rational-basis" scrutiny under the Equal Protection Clause. The city has chosen to impose a rule that separates 14- to 18-year-olds from what may be the corrupting influences of older teenagers and young adults. Ray Couch, an urban planner for the city's Department of Planning and Development, testified:

> "'[O]lder kids [whom the ordinance prohibits from entering Class E dance halls] can access drugs and alcohol, and they have more mature sexual attitudes, more liberal sexual attitudes in general. . . . And we're concerned about mixing up these [older] individuals with youngsters that [sic] have not fully matured.'" 744 S. W. 2d, at 168, n. 3.

A Dallas police officer, Wesley Michael, testified that the age restriction was intended to discourage juvenile crime.

Respondent claims that this restriction "has no real connection with the City's stated interests and objectives." Brief for Respondent 13. Except for saloons and teenage dance halls, respondent argues, teenagers and adults in Dallas may associate with each other, including at the skating area of the Twilight Skating Rink. *Id.*, at 14. Respondent also states, as did the court below, that the city can achieve its objectives through increased supervision, education, and prosecution of those who corrupt minors. *Id.*, at 15.

We think respondent's arguments misapprehend the nature of rational-basis scrutiny, which is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause. In *Dandridge* v. *Williams*, 397 U. S. 471 (1970), in rejecting the claim that Maryland welfare legislation violated the Equal Protection Clause, the Court said:

> "[A] State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78.

> 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61, 69–70. . . .
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> ". . . [The rational-basis standard] is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Id.*, at 485–486 (footnote omitted).

We think that similar considerations support the age restriction at issue here. As we said in *New Orleans* v. *Dukes*, 427 U. S. 297, 303–304 (1976): "[I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." See also *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166, 177 (1980). The city could reasonably conclude, as Couch stated, that teenagers might be susceptible to corrupting influences if permitted, unaccompanied by their parents, to frequent a dance hall with older persons. See 7 E. McQuillin, Law of Municipal Corporations § 24.210 (3d ed. 1981) ("Public dance halls have been regarded as being in that category of businesses and vocations having potential evil consequences"). The city could properly conclude that limiting dance-hall contacts between juveniles and adults would make less likely illicit or undesirable juvenile involvement with alcohol, illegal drugs, and promiscuous sex.[4] It is true that the city allows teenagers

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[4] The Court considered similar factors in *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), where it upheld, over claims of infringement on religious freedom and equal protection, a statute prohibiting children under 12 from selling newspapers on the street. After noting that the statute would have been invalid if applied to adults, the Court said:

"The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. . . . Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and

and adults to roller-skate together, but skating involves less physical contact than dancing. The differences between the two activities may not be striking, but differentiation need not be striking in order to survive rational-basis scrutiny.

We hold that the Dallas ordinance does not infringe on any constitutionally protected right of association, and that a rational relationship exists between the age restriction for Class E dance halls and the city's interest in promoting the welfare of teenagers. The judgment of the Court of Appeals is therefore reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

In my opinion the opportunity to make friends and enjoy the company of other people—in a dance hall or elsewhere—is an aspect of liberty protected by the Fourteenth Amendment. For that reason, I believe the critical issue in this case involves substantive due process rather than the First Amendment right of association. Nonetheless, I agree with the Court that the city has adequately justified the ordinance's modest impairment of the liberty of teenagers. Indeed, I suspect that the ordinance actually gives teenagers

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the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power." *Id.*, at 168–169 (footnotes omitted).

See also *Bellotti* v. *Baird*, 443 U. S. 622, 635 (1979) (plurality opinion), quoting *McKeiver* v. *Pennsylvania*, 403 U. S. 528, 550 (plurality opinion) ("State is entitled to adjust its legal system to account for children's vulnerability and their need for 'concern, . . . sympathy, and . . . paternal attention'"); *Ginsberg* v. *New York*, 390 U. S. 629 (1968) (upholding right of State to prohibit sale of "girlie" magazines to minors).

greater opportunity to associate than they would have if the Class E dance-hall provision were invalidated.* I therefore join the Court's judgment.

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*I do not join the Court's assessment of this case under the Equal Protection Clause. Although the equal protection issue received nominal attention in the trial court, see Pet. for Cert. C–1 to C–7, it was neither reviewed by the Texas Court of Appeals nor briefed before us. See 744 S. W. 2d 165 (1987); Pet. for Cert. 3; Brief for Petitioners 4.

MISSISSIPPI BAND OF CHOCTAW INDIANS *v.* HOLYFIELD ET AL.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

No. 87-980. Argued January 11, 1989—Decided April 3, 1989

On the basis of extensive evidence indicating that large numbers of Indian children were being separated from their families and tribes and were being placed in non-Indian homes through state adoption, foster care, and parental rights termination proceedings, and that this practice caused serious problems for the children, their parents, and their tribes, Congress enacted the Indian Child Welfare Act of 1978 (ICWA), which, *inter alia*, gives tribal courts exclusive jurisdiction over custody proceedings involving an Indian child "who resides or is domiciled within" a tribe's reservation. This case involves the status of twin illegitimate babies, whose parents were enrolled members of appellant Tribe and residents and domiciliaries of its reservation in Neshoba County, Mississippi. After the twins' births in Harrison County, some 200 miles from the reservation, and their parents' execution of consent-to-adoption forms, they were adopted in that county's Chancery Court by the appellees Holyfield, who were non-Indian. That court subsequently overruled appellant's motion to vacate the adoption decree, which was based on the assertion that under the ICWA exclusive jurisdiction was vested in appellant's tribal court. The Supreme Court of Mississippi affirmed, holding, among other things, that the twins were not "domiciled" on the reservation under state law, in light of the Chancery Court's findings (1) that they had never been physically present there, and (2) that they were "voluntarily surrendered" by their parents, who went to some efforts to see that they were born outside the reservation and promptly arranged for their adoption. Therefore, the court said, the twins' domicile was in Harrison County, and the Chancery Court properly exercised jurisdiction over the adoption proceedings.

Held: The twins were "domiciled" on the Tribe's reservation within the meaning of the ICWA's exclusive tribal jurisdiction provision, and the Chancery Court was, accordingly, without jurisdiction to enter the adoption decree. Pp. 42–54.

(a) Although the ICWA does not define "domicile," Congress clearly intended a uniform federal law of domicile for the ICWA and did not consider the definition of the word to be a matter of state law. The ICWA's purpose was, in part, to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings. In fact, the statutory congressional findings demonstrate that Congress perceived the States and their courts as partly responsible for the child separation problem it intended to correct. Thus, it is most improbable that Congress would have intended to make the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law. Moreover, Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of "domicile," whereby different rules could apply from time to time to the same Indian child, simply as a result of his or her being moved across state lines. Pp. 43–47.

(b) The generally accepted meaning of the term "domicile" applies under the ICWA to the extent it is not inconsistent with the objectives of the statute. In the absence of a statutory definition, it is generally assumed that the legislative purpose is expressed by the ordinary meaning of the words used, in light of the statute's object and policy. Well-settled common-law principles provide that the domicile of minors, who generally are legally incapable of forming the requisite intent to establish a domicile, is determined by that of their parents, which has traditionally meant the domicile of the mother in the case of illegitimate children. Thus, since the domicile of the twins' mother (as well as their father) has been, at all relevant times, on appellant's reservation, the twins were also domiciled there even though they have never been there. This result is not altered by the fact that they were "voluntarily surrendered" for adoption. Congress enacted the ICWA because of concerns going beyond the wishes of individual parents, finding that the removal of Indian children from their cultural setting seriously impacts on long-term tribal survival and has a damaging social and psychological impact on many individual Indian children. These concerns demonstrate that Congress could not have intended to enact a rule of domicile that would permit individual Indian parents to defeat the ICWA's jurisdictional scheme simply by giving birth and placing the child for adoption off the reservation. Pp. 47–53.

511 So. 2d 918, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY, J., joined, *post*, p. 54.

Edwin R. Smith argued the cause and filed briefs for appellant.

Edward O. Miller argued the cause and filed a brief for appellees.*

JUSTICE BRENNAN delivered the opinion of the Court.

This appeal requires us to construe the provisions of the Indian Child Welfare Act that establish exclusive tribal jurisdiction over child custody proceedings involving Indian children domiciled on the tribe's reservation.

I

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The Indian Child Welfare Act of 1978 (ICWA), 92 Stat. 3069, 25 U. S. C. §§1901–1963, was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes. Senate oversight hearings in 1974 yielded numerous examples, statistical data, and expert testimony documenting what one witness called "[t]he wholesale removal of Indian children from their homes, . . . the most tragic aspect of Indian life today." Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., 3 (statement of William Byler) (hereinafter 1974 Hearings). Studies undertaken by the Association on American Indian Affairs in 1969 and 1974, and presented in the Senate hearings, showed that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. *Id.*,

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*Briefs of *amici curiae* urging reversal were filed for the Association of American Indian Affairs, Inc., et al. by *Bertram E. Hirsch* and *Jack F. Trope;* for the Menominee Indian Tribe of Wisconsin by *Kathryn L. Tierney;* for the Navajo Nation by *Donald R. Wharton;* and for the Swinomish Tribal Community et al. by *Jeanette Wolfley*, *Craig J. Dorsay*, and *Richard Dauphinais*.

at 15; see also H. R. Rep. No. 95–1386, p. 9 (1978) (hereinafter House Report). Adoptive placements counted significantly in this total: in the State of Minnesota, for example, one in eight Indian children under the age of 18 was in an adoptive home, and during the year 1971–1972 nearly one in every four infants under one year of age was placed for adoption. The adoption rate of Indian children was eight times that of non-Indian children. Approximately 90% of the Indian placements were in non-Indian homes. 1974 Hearings, at 75–83. A number of witnesses also testified to the serious adjustment problems encountered by such children during adolescence,[1] as well as the impact of the adoptions on Indian parents and the tribes themselves. See generally 1974 Hearings.

Further hearings, covering much the same ground, were held during 1977 and 1978 on the bill that became the

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[1] For example, Dr. Joseph Westermeyer, a University of Minnesota social psychiatrist, testified about his research with Indian adolescents who experienced difficulty coping in white society, despite the fact that they had been raised in a purely white environment:

"[T]hey were raised with a white cultural and social identity. They are raised in a white home. They attended, predominantly white schools, and in almost all cases, attended a church that was predominantly white, and really came to understand very little about Indian culture, Indian behavior, and had virtually no viable Indian identity. They can recall such things as seeing cowboys and Indians on TV and feeling that Indians were a historical figure but were not a viable contemporary social group.

"Then during adolescence, they found that society was not to grant them the white identity that they had. They began to find this out in a number of ways. For example, a universal experience was that when they began to date white children, the parents of the white youngsters were against this, and there were pressures among white children from the parents not to date these Indian children. . . .

"The other experience was derogatory name calling in relation to their racial identity . . . .

. . . . .

"[T]hey were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did possess." 1974 Hearings, at 46.

ICWA.[2] While much of the testimony again focused on the harm to Indian parents and their children who were involuntarily separated by decisions of local welfare authorities, there was also considerable emphasis on the impact on the tribes themselves of the massive removal of their children. For example, Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association, testified as follows:

> "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships." 1978 Hearings, at 193.

See also *id.*, at 62.[3] Chief Isaac also summarized succinctly what numerous witnesses saw as the principal reason for the high rates of removal of Indian children:

> "One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life

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[2] Hearing on S. 1214 before the Senate Select Committee on Indian Affairs, 95th Cong., 1st Sess. (1977) (hereinafter 1977 Hearings); Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess. (1978) (hereinafter 1978 Hearings).

[3] These sentiments were shared by the ICWA's principal sponsor in the House, Rep. Morris Udall, see 124 Cong. Rec. 38102 (1978) ("Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy"), and its minority sponsor, Rep. Robert Lagomarsino, see *ibid.* ("This bill is directed at conditions which . . . threaten . . . the future of American Indian tribes . . .").

> and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child." *Id.*, at 191–192.[4]

The congressional findings that were incorporated into the ICWA reflect these sentiments. The Congress found:

> "(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ;
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> "(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
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> "(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people

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[4] One of the particular points of concern was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society. The House Report on the ICWA noted: "An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." House Report, at 10. At the conclusion of the 1974 Senate hearings, Senator Abourezk noted the role that such extended families played in the care of children: "We've had testimony here that in Indian communities throughout the Nation there is no such thing as an abandoned child because when a child does have a need for parents for one reason or another, a relative or a friend will take that child in. It's the extended family concept." 1974 Hearings, at 473. See also *Wisconsin Potowatomies of Hannahville Indian Community* v. *Houston*, 393 F. Supp. 719 (WD Mich. 1973) (discussing custom of extended family and tribe assuming responsibility for care of orphaned children).

> and the cultural and social standards prevailing in Indian communities and families." 25 U. S. C. § 1901.

At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. Section 1911 lays out a dual jurisdictional scheme. Section 1911(a) establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child "who resides or is domiciled within the reservation of such tribe," as well as for wards of tribal courts regardless of domicile.[5] Section 1911(b), on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, state-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of "good cause," objection by either parent, or declination of jurisdiction by the tribal court.

Various other provisions of ICWA Title I set procedural and substantive standards for those child custody proceedings that do take place in state court. The procedural safeguards include requirements concerning notice and appointment of counsel; parental and tribal rights of intervention and petition for invalidation of illegal proceedings; procedures governing voluntary consent to termination of parental rights; and a full faith and credit obligation in respect to tribal court decisions. See §§ 1901–1914. The most important substantive requirement imposed on state courts is that of § 1915(a), which, absent "good cause" to the contrary, mandates that adoptive placements be made preferentially with (1) members of the child's extended family, (2) other members of the same tribe, or (3) other Indian families.

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[5] Section 1911(a) reads in full:

"An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child."

The ICWA thus, in the words of the House Report accompanying it, "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." House Report, at 23. It does so by establishing "a Federal policy that, where possible, an Indian child should remain in the Indian community," *ibid.*, and by making sure that Indian child welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family." *Id.*, at 24.[6]

B

This case involves the status of twin babies, known for our purposes as B. B. and G. B., who were born out of wedlock on December 29, 1985. Their mother, J. B., and father, W. J., were both enrolled members of appellant Mississippi Band of Choctaw Indians (Tribe), and were residents and domiciliaries of the Choctaw Reservation in Neshoba County, Mississippi. J. B. gave birth to the twins in Gulfport, Harrison County, Mississippi, some 200 miles from the reservation. On January 10, 1986, J. B. executed a consent-to-adoption form before the Chancery Court of Harrison

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[6] The quoted passages are from the House Report's discussion of § 1915, in which the ICWA attempts to accomplish these aims, in regard to nondomiciliaries of the reservation, through the establishment of standards for state-court proceedings. In regard to reservation domiciliaries, these goals are pursued through the establishment of exclusive tribal jurisdiction under § 1911(a).

Beyond its jurisdictional and other provisions concerning child custody proceedings, the ICWA also created, in its Title II, a program of grants to Indian tribes and organizations to aid in the establishment of child welfare programs. See 25 U. S. C. §§ 1931–1934.

County. Record 8–10.[7] W. J. signed a similar form.[8] On January 16, appellees Orrey and Vivian Holyfield[9] filed a petition for adoption in the same court, *id.*, at 1–5, and the chancellor issued a Final Decree of Adoption on January 28. *Id.*, at 13–14.[10] Despite the court's apparent awareness of the ICWA,[11] the adoption decree contained no reference to it, nor to the infants' Indian background.

Two months later the Tribe moved in the Chancery Court to vacate the adoption decree on the ground that under the ICWA exclusive jurisdiction was vested in the tribal court. *Id.*, at 15–18.[12] On July 14, 1986, the court overruled the motion, holding that the Tribe "never obtained exclusive jurisdiction over the children involved herein . . . ." The court's one-page opinion relied on two facts in reaching that conclusion. The court noted first that the twins' mother "went to some efforts to see that they were born outside the confines of the Choctaw Indian Reservation" and that the parents had promptly arranged for the adoption by the Holyfields. Second, the court stated: "At no time from the birth of these children to the present date have either of them resided on or physically been on the Choctaw Indian Reservation." *Id.*, at 78.

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[7] Section 103(a) of the ICWA, 25 U. S. C. § 1913(a), requires that any voluntary consent to termination of parental rights be executed in writing and recorded before a judge of a "court of competent jurisdiction," who must certify that the terms and consequences of the consent were fully explained and understood. Section 1913(a) also provides that any consent given prior to birth or within 10 days thereafter is invalid. In this case the mother's consent was given 12 days after the birth. See also n. 26, *infra.*

[8] W. J.'s consent to adoption was signed before a notary public in Neshoba County on January 11, 1986. Record 11–12. Only on June 3, 1986, however—well after the decree of adoption had been entered and after the Tribe had filed suit to vacate that decree—did the chancellor of the Chancery Court certify that W. J. had appeared before him in Harrison County to execute the consent to adoption. *Id.*, at 12–A.

[9] Appellee Orrey Holyfield died during the pendency of this appeal.

[10] Mississippi adoption law provides for a 6-month waiting period between interlocutory and final decrees of adoption, but grants the chancellor discretionary authority to waive that requirement and immediately enter a final decree of adoption. See Miss. Code Ann. § 93–17–13 (1972). The chancellor did so here, Record 14, with the result that the final decree of adoption was entered less than one month after the babies' birth.

[11] The chancellor's certificates that the parents had appeared before him to consent to the adoption recited that "the Consent and Waiver was given in full compliance with Section 103(a) of Public Law 95–608" (*i. e.*, 25 U. S. C. § 1913(a)). Record 10, 12–A.

[12] The ICWA specifically confers standing on the Indian child's tribe to participate in child custody adjudications. Title 25 U. S. C. § 1914 authorizes the tribe (as well as the child and its parents) to petition a court to invalidate any foster care placement or termination of parental rights

The Supreme Court of Mississippi affirmed. 511 So. 2d 918 (1987). It rejected the Tribe's arguments that the state court lacked jurisdiction and that it, in any event, had not applied the standards laid out in the ICWA. The court recognized that the jurisdictional question turned on whether the twins were domiciled on the Choctaw Reservation. It answered that question as follows:

> "At no point in time can it be said the twins resided on or were domiciled within the territory set aside for the reservation. Appellant's argument that living within the womb of their mother qualifies the children's residency on the reservation may be lauded for its creativity; however, apparently it is unsupported by any law within this state, and will not be addressed at this time due to the far-reaching legal ramifications that would occur were we to follow such a complicated tangential course." *Id.*, at 921.

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under state law "upon a showing that such action violated any provision of sections 101, 102, and 103" of the ICWA. 92 Stat. 3072. See also § 1911(c) (Indian child's tribe may intervene at any point in state-court proceedings for foster care placement or termination of parental rights). "Termination of parental rights" is defined in § 1903(1)(ii) as "any action resulting in the termination of the parent-child relationship."

The court distinguished Mississippi cases that appeared to establish the principle that "the domicile of minor children follows that of the parents," *ibid.;* see *Boyle* v. *Griffin*, 84 Miss. 41, 36 So. 141 (1904); *Stubbs* v. *Stubbs*, 211 So. 2d 821 (Miss. 1968); see also *In re Guardianship of Watson*, 317 So. 2d 30 (Miss. 1975). It noted that "the Indian twins . . . were voluntarily surrendered and legally abandoned by the natural parents to the adoptive parents, and it is undisputed that the parents went to some efforts to prevent the children from being placed on the reservation as the mother arranged for their birth and adoption in Gulfport Memorial Hospital, Harrison County, Mississippi." 511 So. 2d, at 921. Therefore, the court said, the twins' domicile was in Harrison County and the state court properly exercised jurisdiction over the adoption proceedings. Indeed, the court appears to have concluded that, for this reason, *none* of the provisions of the ICWA was applicable. *Ibid.* ("[T]hese proceedings . . . actually escape applicable federal law on Indian Child Welfare"). In any case, it rejected the Tribe's contention that the requirements of the ICWA applicable in state courts had not been followed: "[T]he judge did conform and strictly adhere to the minimum federal standards governing adoption of Indian children with respect to parental consent, notice, service of process, etc." *Ibid.*[13]

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[13] The lower court may well have fulfilled the applicable ICWA procedural requirements. But see n. 8, *supra*, and n. 26, *infra*. It clearly did not, however, comply with or even take cognizance of the substantive mandate of § 1915(a): "In any adoptive placement of an Indian child *under State law*, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." (Emphasis added.) Section 1915(e), moreover, requires the court to maintain records "evidencing the efforts to comply with the order of preference specified in this section." Notwithstanding the Tribe's argument below that § 1915 had been violated, see Brief for Appellant 20–22 and Appellant's Brief in Support of Petition for Rehearing 11–12 in No. 57,659 (Miss. Sup. Ct.), the Mississippi Supreme Court made no reference to it, merely stating in conclusory fashion that the "minimum federal standards" had been met. 511 So. 2d, at 921.

Because of the centrality of the exclusive tribal jurisdiction provision to the overall scheme of the ICWA, as well as the conflict between this decision of the Mississippi Supreme Court and those of several other state courts,[14] we granted plenary review. 486 U. S. 1021 (1988).[15] We now reverse.

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[14] See, *e. g.*, *In re Adoption of Halloway*, 732 P. 2d 962 (Utah 1986); *In re Adoption of Baby Child*, 102 N. M. 735, 700 P. 2d 198 (App. 1985); *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P. 2d 187 (App. 1981), cert. denied *sub nom. Catholic Social Services of Tucson* v. *P. C.*, 455 U. S. 1007 (1982).

[15] Because it was unclear whether this case fell within the Court's appellate jurisdiction, we postponed consideration of our jurisdiction to the hearing on the merits. Pursuant to the version of 28 U. S. C. § 1257(2) applicable to this appeal, we have appellate jurisdiction to review a state-court judgment "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." It is sufficient that the validity of the state statute be challenged and sustained as applied to a particular set of facts. *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U. S. 468, 473–474, n. 4 (1989); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 288–290 (1921). In practice, whether such an as-applied challenge comes within our appellate jurisdiction often turns on how that challenge is framed. See *Hanson* v. *Denckla*, 357 U. S. 235, 244 (1958); *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 650–651 (1942).

In the present case appellants argued below "that the state lower court jurisdiction over these adoptions was preempted by plenary federal legislation." Brief for Appellant in No. 57,659 (Miss. Sup. Ct.), p. 5. Whether this formulation "squarely" challenges the validity of the state adoption statute as applied, see *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 440–441 (1979), or merely asserts a federal right or immunity, 28 U. S. C. § 1257(3), is a difficult question to which the answer must inevitably be somewhat arbitrary. Since in the near future our appellate jurisdiction will extend only to rare cases, see Pub. L. 100–352, 102 Stat. 662, it is also a question of little prospective importance. Rather than attempting to resolve this question, therefore, we think it advisable to assume that the appeal is improper and to consider by writ of certiorari the important question this case presents. See *Spencer* v. *Texas*, 385 U. S. 554, 557, n. 3 (1967). We therefore dismiss the appeal, treat the papers as a petition for writ of certiorari, 28 U. S. C. § 2103, and grant the petition. (For convenience, we will continue to refer to the parties as appellant and appellees.)

II

Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA. Indeed, some of the ICWA's jurisdictional provisions have a strong basis in pre-ICWA case law in the federal and state courts. See, *e. g.*, *Fisher* v. *District Court, Sixth Judicial District of Montana*, 424 U. S. 382 (1976) *(per curiam)* (tribal court had exclusive jurisdiction over adoption proceeding where all parties were tribal members and reservation residents); *Wisconsin Potowatomies of Hannahville Indian Community* v. *Houston*, 393 F. Supp. 719 (WD Mich. 1973) (tribal court had exclusive jurisdiction over custody of Indian children found to have been domiciled on reservation); *Wakefield* v. *Little Light*, 276 Md. 333, 347 A. 2d 228 (1975) (same); *In re Adoption of Buehl*, 87 Wash. 2d 649, 555 P. 2d 1334 (1976) (state court lacked jurisdiction over custody of Indian children placed in off-reservation foster care by tribal court order); see also *In re Lelah-puc-ka-chee*, 98 F. 429 (ND Iowa 1899) (state court lacked jurisdiction to appoint guardian for Indian child living on reservation). In enacting the ICWA Congress confirmed that, in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to the States.

The state-court proceeding at issue here was a "child custody proceeding." That term is defined to include any "'adoptive placement' which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption." 25 U. S. C. § 1903 (1)(iv). Moreover, the twins were "Indian children." See 25 U. S. C. § 1903(4). The sole issue in this case is, as the Supreme Court of Mississippi recognized, whether the twins were "domiciled" on the reservation.[16]

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[16] "Reservation" is defined quite broadly for purposes of the ICWA. See 25 U. S. C. § 1903(10). There is no dispute that the Choctaw Reservation falls within that definition.

Section 1911(a) does not apply "where such jurisdiction is otherwise vested in the State by existing Federal law." This proviso would appear

A

The meaning of "domicile" in the ICWA is, of course, a matter of Congress' intent. The ICWA itself does not define it. The initial question we must confront is whether there is any reason to believe that Congress intended the ICWA definition of "domicile" to be a matter of state law. While the meaning of a federal statute is necessarily a federal question in the sense that its construction remains subject to this Court's supervision, see P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 566 (3d ed. 1988); cf. *Reconstruction Finance Corporation* v. *Beaver County*, 328 U. S. 204, 210 (1946), Congress sometimes intends that a statutory term be given content by the application of state law. *De Sylva* v. *Ballentine*, 351 U. S. 570, 580 (1956); see also *Beaver County*, *supra; Helvering* v. *Stuart*, 317 U. S. 154, 161–162 (1942). We start, however, with the general assumption that "in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Jerome* v. *United States*, 318 U. S. 101, 104 (1943); *NLRB* v. *Natural Gas Utility Dist. of Hawkins County*, 402 U. S. 600, 603 (1971); *Dickerson* v. *New Banner Institute, Inc.*, 460 U. S. 103, 119 (1983). One reason for this rule of construction is that federal statutes are generally intended to have uniform nationwide application. *Jerome*, *supra*, at 104; *Dickerson*, *supra*, at 119–120; *United States* v. *Pelzer*, 312 U. S. 399, 402–403 (1941). Accordingly, the cases in which we have

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to refer to Pub. L. 280, 67 Stat. 588, as amended, which allows States under certain conditions to assume civil and criminal jurisdiction on the reservations. Title 25 U. S. C. § 1918 permits a tribe in that situation to reassume jurisdiction over child custody proceedings upon petition to the Secretary of the Interior. The State of Mississippi has never asserted jurisdiction over the Choctaw Reservation under Public Law 280. See F. Cohen, Handbook of Federal Indian Law 362–363, and nn. 122–125 (1982); cf. *United States* v. *John*, 437 U. S. 634 (1978).

found that Congress intended a state-law definition of a statutory term have often been those where uniformity clearly was not intended. *E. g.*, *Beaver County*, *supra*, at 209 (statute permitting States to apply their diverse local tax laws to real property of certain Government corporations). A second reason for the presumption against the application of state law is the danger that "the federal program would be impaired if state law were to control." *Jerome*, *supra*, at 104; *Dickerson*, *supra*, at 119–120; *Pelzer*, 312 U. S., at 402–403. For this reason, "we look to the purpose of the statute to ascertain what is intended." *Id.*, at 403.

In *NLRB* v. *Hearst Publications*, *Inc.*, 322 U. S. 111 (1944), we rejected an argument that the term "employee" as used in the Wagner Act should be defined by state law. We explained our conclusion as follows:

> "Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no . . . patchwork plan for securing freedom of employees' organization and of collective bargaining. The Wagner Act is . . . intended to solve a national problem on a national scale. . . . Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by . . . varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems." *Id.*, at 123.

See also *Natural Gas Utility Dist.*, *supra*, at 603–604. For the two principal reasons that follow, we believe that what we said of the Wagner Act applies equally well to the ICWA.

First, and most fundamentally, the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary. It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities.[17] More specifically, its purpose was, in part, to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings. Indeed, the congressional findings that are a part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct. See 25 U. S. C. § 1901(5) (state "judicial bodies . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families").[18] Under these circumstances it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law.

Second, Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of domicile. An example will illustrate. In a case quite similar to this one, the New Mexico state courts found exclusive jurisdiction in the tribal court pursuant to § 1911(a), because the illegitimate child took the reservation domicile of its mother at birth—notwithstanding that the child was placed in the custody of adoptive parents 2 days after its off-reservation birth and the mother executed a consent to adoption 10 days later. *In re Adoption of Baby Child*, 102 N. M. 735, 737–738, 700 P. 2d 198, 200–201 (App. 1985).[19] Had that mother traveled to Mississippi to give birth, rather than to Albuquerque, a different result would have obtained if state-law definitions of domicile applied. The same, presumably, would be true if the child had been transported to Mississippi for adoption after her off-reservation birth in New Mexico. While the child's custody proceeding would have been subject to exclusive tribal jurisdiction in her home State, her mother, prospective adoptive parents, or an adoption intermediary could have obtained an adoption decree in state court merely by transporting her across state lines.[20] Even if we could conceive of a federal statute under which the rules of domicile (and thus of jurisdiction) applied differently to different Indian children, a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind.[21]

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[17] This conclusion is inescapable from a reading of the entire statute, the main effect of which is to curtail state authority. See especially §§ 1901, 1911–1916, 1918.

[18] See also 124 Cong. Rec. 38103 (1978) (letter from Rep. Morris K. Udall to Assistant Attorney General Patricia M. Wald) ("[S]tate courts and agencies and their procedures share a large part of the responsibility" for the crisis threatening "the future and integrity of Indian tribes and Indian families"); House Report, at 19 ("Contributing to this problem has been the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future"). See also *In re Adoption of Halloway*, 732 P. 2d, at 969 (Utah state court "quite frankly might be expected to be more receptive than a tribal court to [Indian child's] placement with non-Indian adoptive parents. Yet this receptivity of the non-Indian forum to non-Indian placement of an Indian child is precisely one of the evils at which the ICWA was aimed").

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[19] Some details of the *Baby Child* case are taken from the briefs in *Pino* v. *District Court, Bernalillo County*, O. T. 1984, No. 84–248. That appeal was dismissed under this Court's Rule 53, 472 U. S. 1001 (1985), following the appellant's successful collateral attack, in the case cited in the text, on the judgment from which appeal had been taken.

[20] Nor is it inconceivable that a State might apply its law of domicile in such a manner as to render inapplicable § 1911(a) even to a child who had lived several years on the reservation but was removed from it for the purpose of adoption. Even in the less extreme case, a state-law definition of domicile would likely spur the development of an adoption brokerage business. Indian children, whose parents consented (with or without financial inducement) to give them up, could be transported for adoption to States like Mississippi where the law of domicile permitted the proceedings to take place in state court.

[21] For this reason, the general rule that domicile is determined according to the law of the forum, see Restatement (Second) of Conflict of Laws § 13 (1971) (hereinafter Restatement), can have no application here.

We therefore think it beyond dispute that Congress intended a uniform federal law of domicile for the ICWA.[22]

B

It remains to give content to the term "domicile" in the circumstances of the present case. The holding of the Supreme Court of Mississippi that the twin babies were not domiciled on the Choctaw Reservation appears to have rested on two findings of fact by the trial court: (1) that they had never been physically present there, and (2) that they were "voluntarily surrendered" by their parents. 511 So. 2d, at 921; see Record 78. The question before us, therefore, is whether under the ICWA definition of "domicile" such facts suffice to render the twins nondomiciliaries of the reservation.

We have often stated that in the absence of a statutory definition we "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U. S. 1, 9 (1962); *Russello* v. *United States*, 464 U. S. 16, 21 (1983). We do so, of course, in the light of the "'object and policy'" of the statute. *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 285 (1956), quoting *United States* v. *Heirs of Boisdoré*, 8 How. 113, 122 (1849). We therefore look both to the generally accepted meaning of the term "domicile" and to the purpose of the statute.

That we are dealing with a uniform federal rather than a state definition does not, of course, prevent us from drawing on general state-law principles to determine "the ordinary meaning of the words used." Well-settled state law can inform our understanding of what Congress had in mind when it employed a term it did not define. Accordingly, we find it helpful to borrow established common-law principles of domicile to the extent that they are not inconsistent with the objectives of the congressional scheme.

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[22] We note also the likelihood that, had Congress intended a state-law definition of domicile, it would have said so. Where Congress did intend that ICWA terms be defined by reference to other than federal law, it stated this explicitly. See § 1903(2) ("extended family member" defined by reference to tribal law or custom); § 1903(6) ("Indian custodian" defined by reference to tribal law or custom and to state law).

"Domicile" is, of course, a concept widely used in both federal and state courts for jurisdiction and conflict-of-laws purposes, and its meaning is generally uncontroverted. See generally Restatement §§ 11–23; R. Leflar, L. McDougal, & R. Felix, American Conflicts Law 17–38 (4th ed. 1986); R. Weintraub, Commentary on the Conflict of Laws 12–24 (2d ed. 1980). "Domicile" is not necessarily synonymous with "residence," *Perri* v. *Kisselbach*, 34 N. J. 84, 87, 167 A. 2d 377, 379 (1961), and one can reside in one place but be domiciled in another, *District of Columbia* v. *Murphy*, 314 U. S. 441 (1941); *In re Estate of Jones*, 192 Iowa 78, 80, 182 N. W. 227, 228 (1921). For adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there. *Texas* v. *Florida*, 306 U. S. 398, 424 (1939). One acquires a "domicile of origin" at birth, and that domicile continues until a new one (a "domicile of choice") is acquired. *Jones*, *supra*, at 81, 182 N. W., at 228; *In re Estate of Moore*, 68 Wash. 2d 792, 796, 415 P. 2d 653, 656 (1966). Since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents. *Yarborough* v. *Yarborough*, 290 U. S. 202, 211 (1933). In the case of an illegitimate child, that has traditionally meant the domicile of its mother. *Kowalski* v. *Wojtkowski*, 19 N. J. 247, 258, 116 A. 2d 6, 12 (1955); *Moore*, *supra*, at 796, 415 P. 2d, at 656; Restatement § 14(2), § 22, Comment *c;* 25 Am. Jur. 2d, Domicil § 69 (1966). Under these principles, it is entirely logical that "[o]n occasion, a child's domicil of origin will be in a place where the child has never been." Restatement § 14, Comment *b*.

It is undisputed in this case that the domicile of the mother (as well as the father) has been, at all relevant times, on the Choctaw Reservation. Tr. of Oral Arg. 28–29. Thus, it is clear that at their birth the twin babies were also domiciled on the reservation, even though they themselves had never been there. The statement of the Supreme Court of Mississippi that "[a]t no point in time can it be said the twins . . . were domiciled within the territory set aside for the reservation," 511 So. 2d, at 921, may be a correct statement of that State's law of domicile, but it is inconsistent with generally accepted doctrine in this country and cannot be what Congress had in mind when it used the term in the ICWA.

Nor can the result be any different simply because the twins were "voluntarily surrendered" by their mother. Tribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians. See 25 U. S. C. §§ 1901(3) ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children"), 1902 ("promote the stability and security of Indian tribes").[23] The numerous prerogatives accorded the tribes through the ICWA's substantive provisions, *e. g.*, §§ 1911(a) (exclusive jurisdiction over reservation domiciliaries), 1911(b) (presumptive jurisdiction over nondomiciliaries), 1911(c) (right of intervention), 1912(a) (notice), 1914 (right to petition for invalidation of state-court action), 1915(c) (right to alter presumptive placement priorities applicable to state-court actions), 1915(e) (right to obtain records), 1919 (authority to conclude agreements with States), must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves.

In addition, it is clear that Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture.[24] Congress determined to subject such placements to the ICWA's jurisdictional and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents. As the 1977 Final Report of the congressionally established American Indian Policy Review Commission stated, in summarizing these two concerns, "[r]emoval of Indian children from their cultural setting seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children." Senate Report, at 52.[25]

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[23] See also *supra*, at 34, and n. 3.

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[24] In large part the concerns that emerged during the congressional hearings on the ICWA were based on studies showing recurring developmental problems encountered during adolescence by Indian children raised in a white environment. See n. 1, *supra*. See also 1977 Hearings, at 114 (statement of American Academy of Child Psychiatry); S. Rep. No. 95–597, p. 43 (1977) (hereinafter Senate Report). More generally, placements in non-Indian homes were seen as "depriving the child of his or her tribal and cultural heritage." *Id.*, at 45; see also 124 Cong. Rec. 38102–38103 (1978) (remarks of Rep. Lagomarsino). The Senate Report on the ICWA incorporates the testimony in this sense of Louis La Rose, chairman of the Winnebago Tribe, before the American Indian Policy Review Commission:

> "I think the cruelest trick that the white man has ever done to Indian children is to take them into adoption courts, erase all of their records and send them off to some nebulous family that has a value system that is A–1 in the State of Nebraska and that child reaches 16 or 17, he is a little brown child residing in a white community and he goes back to the reservation and he has absolutely no idea who his relatives are, and they effectively make him a non-person and I think . . . they destroy him." Senate Report, at 43.

Thus, the conclusion seems justified that, as one state court has put it, "[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." *In re Appeal in Pima County Juvenile Action No. S–903*, 130 Ariz., at 204, 635 P. 2d, at 189.

[25] While the statute itself makes clear that Congress intended the ICWA to reach voluntary as well as involuntary removal of Indian children, the same conclusion can also be drawn from the ICWA's legislative history. For example, the House Report contains the following expression of Congress' concern with both aspects of the problem:

These congressional objectives make clear that a rule of domicile that would permit individual Indian parents to defeat the ICWA's jurisdictional scheme is inconsistent with what Congress intended.[26] See *In re Adoption of Child of Indian Heritage*, 111 N. J. 155, 168–171, 543 A. 2d 925, 931–933 (1988). The appellees in this case argue strenuously that the twins' mother went to great lengths to give birth off the reservation so that her children could be adopted by the Holyfields. But that was precisely part of Congress' con-

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"One of the effects of our national paternalism has been to so alienate some Indian [parents] from their society that they abandon their children at hospitals or to welfare departments rather than entrust them to the care of relatives in the extended family. Another expression of it is the involuntary, arbitrary, and unwarranted separation of families." House Report, at 12.

[26] The Bureau of Indian Affairs pointed out, in issuing nonbinding ICWA guidelines for the state courts, that the terms "residence" and "domicile" "are well defined under existing state law. There is no indication that these state law definitions tend to undermine in any way the purposes of the Act." 44 Fed. Reg. 67584, 67585 (1979). The clear implication is that state law that *did* tend to undermine the ICWA's purposes could not be taken to express Congress' intent. There is some authority for the proposition that abandonment can effectuate a change in the child's domicile, *In re Adoption of Halloway*, 732 P. 2d, at 967, although this may not be the majority rule. See Restatement § 22, Comment *e* (abandoned child generally retains the domicile of the last-abandoning parent). In any case, as will be seen below, the Supreme Court of Utah declined in the *Halloway* case to apply Utah abandonment law to defeat the purpose of the ICWA. Similarly, the conclusory statement of the Supreme Court of Mississippi that the twin babies had been "legally abandoned," 511 So. 2d, at 921, cannot be determinative of ICWA jurisdiction.

There is also another reason for reaching this conclusion. The predicate for the state court's abandonment finding was the parents' consent to termination of their parental rights, recorded before a judge of the state Chancery Court. ICWA § 103(a), 25 U. S. C. § 1913(a), requires, however, that such a consent be recorded before "a judge of a court of competent jurisdiction." See n. 7, *supra*. In the case of reservation-domiciled children, that could be only the tribal court. The children therefore could not be made nondomiciliaries of the reservation through any such state-court consent.

cern. Permitting individual members of the tribe to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would, to a large extent, nullify the purpose the ICWA was intended to accomplish.[27] The Supreme Court of Utah expressed this well in its scholarly and sensitive opinion in what has become a leading case on the ICWA:

> "To the extent that [state] abandonment law operates to permit [the child's] mother to change [the child's] domicile as part of a scheme to facilitate his adoption by non-Indians while she remains a domiciliary of the reservation, it conflicts with and undermines the operative scheme established by subsections [1911(a)] and [1913(a)] to deal with children of domiciliaries of the reservation and weakens considerably the tribe's ability to assert its interest in its children. The protection of this tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents. This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States. It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court as the exclusive forum for the determination of custody and

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[27] It appears, in fact, that all Choctaw women give birth off the reservation because of the lack of appropriate obstetric facilities there. See Juris. Statement 4, n. 2. In most cases, of course, the mother and child return to the reservation after the birth, and this would presumably be sufficient to make the child a reservation domiciliary even under the Mississippi court's theory. Application of the Mississippi domicile rule would, however, permit state authorities to avoid the tribal court's exclusive § 1911(a) jurisdiction by removing a newborn from an allegedly unfit mother while in the hospital, and seeking to terminate her parental rights in state court.

> adoption matters for reservation-domiciled Indian children, and the preferred forum for nondomiciliary Indian children. [State] abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parents." *In re Adoption of Halloway*, 732 P. 2d 962, 969–970 (1986).

We agree with the Supreme Court of Utah that the law of domicile Congress used in the ICWA cannot be one that permits individual reservation-domiciled tribal members to defeat the tribe's exclusive jurisdiction by the simple expedient of giving birth and placing the child for adoption off the reservation. Since, for purposes of the ICWA, the twin babies in this case were domiciled on the reservation when adoption proceedings were begun, the Choctaw tribal court possessed exclusive jurisdiction pursuant to 25 U. S. C. § 1911(a). The Chancery Court of Harrison County was, accordingly, without jurisdiction to enter a decree of adoption; under ICWA § 104, 25 U. S. C. § 1914, its decree of January 28, 1986, must be vacated.

III

We are not unaware that over three years have passed since the twin babies were born and placed in the Holyfield home, and that a court deciding their fate today is not writing on a blank slate in the same way it would have in January 1986. Three years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain.

Whatever feelings we might have as to where the twins should live, however, it is not for us to decide that question. We have been asked to decide the legal question of *who* should make the custody determination concerning these children—not what the outcome of that determination should be. The law places that decision in the hands of the Choctaw tribal court. Had the mandate of the ICWA been followed in

1986, of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation." *Halloway*, 732 P. 2d, at 972. It is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe—and perhaps the children themselves—in having them raised as part of the Choctaw community.[28] Rather, "we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy." *Ibid.*

The judgment of the Supreme Court of Mississippi is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, dissenting.

The parents of these twin babies unquestionably expressed their intention to have the state court exercise jurisdiction over them. J. B. gave birth to the twins at a hospital 200 miles from the reservation, even though a closer hospital was available. Both parents gave their written advance consent to the adoption and, when the adoption was later challenged by the Tribe, they reaffirmed their desire that the Holyfields adopt the two children. As the Mississippi Supreme Court found, "the parents went to some efforts to prevent the children from being placed on the reservation as the mother arranged for their birth and adoption in Gulfport Memorial Hospital, Harrison County, Mississippi." 511 So. 2d 918, 921 (1987). Indeed, Appellee Vivian Holyfield appears before us today, urging that she be allowed to retain custody of B. B. and G. B.

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[28] We were assured at oral argument that the Choctaw court has the authority under the tribal code to permit adoption by the present adoptive family, should it see fit to do so. Tr. of Oral Arg. 17.

Because J. B.'s domicile is on the reservation and the children are eligible for membership in the Tribe, the Court today closes the state courthouse door to her. I agree with the Court that Congress intended a uniform federal law of domicile for the Indian Child Welfare Act of 1978 (ICWA), 92 Stat. 3069, 25 U. S. C. §§1901–1963, and that domicile should be defined with reference to the objectives of the congressional scheme. "To ascertain [the term's] meaning we . . . consider the Congressional history of the Act, the situation with reference to which it was enacted, and the existing judicial precedents, with which Congress may be taken to have been familiar in at least a general way." *District of Columbia* v. *Murphy*, 314 U. S. 441, 449 (1941). I cannot agree, however, with the cramped definition the Court gives that term. To preclude parents domiciled on a reservation from deliberately invoking the adoption procedures of state court, the Court gives "domicile" a meaning that Congress could not have intended and distorts the delicate balance between individual rights and group rights recognized by the ICWA.

The ICWA was passed in 1978 in response to congressional findings that "an alarmingly high percentage of Indian families are broken up by the *removal*, often unwarranted, of their children from them by nontribal public and private agencies," and that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U. S. C. §§1901(4), (5) (emphasis added). The Act is thus primarily addressed to the unjustified removal of Indian children from their families through the application of standards that inadequately recognized the distinct Indian culture.[1]

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[1] The House Report found that "Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole." H. R. Rep. No. 95–1386, p. 9 (1978) (hereinafter House Report). The

The most important provisions of the ICWA are those setting forth minimum standards for the placement of Indian children by state courts and providing procedural safeguards to insure that parental rights are protected.[2] The Act pro-

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Senate Report similarly states that the Act was motivated by "reports that an alarmingly high percentage of Indian children were being separated from their natural parents through the actions of nontribal government agencies." S. Rep. No. 95–597, p. 11 (1977). See also 124 Cong. Rec. 12532 (1978) (remarks of Rep. Udall) ("The record developed by the Policy Review Commission, by the Senate Interior Committee in the 94th Congress; and by the Senate Select Committee on Indian Affairs and our own Interior Committee in the 95th Congress has disclosed what almost amounts to a callous raid on Indian children. Indian children are removed from their parents and families by State agencies for the most specious of reasons in proceedings foreign to the Indian parents"); *id.*, at 38102 (remarks of Rep. Udall) ("Studies have revealed that about 25 percent of all Indian children are removed from their homes and placed in some foster care or adoptive home or institution"); *id.*, at 38103 (remarks of Rep. Lagomarsino) ("For Indians generally and tribes in particular, the continued wholesale removal of their children by nontribal government and private agencies constitutes a serious threat to their existence as ongoing, self-governing communities"); Hearing on S. 1214 before the Senate Select Committee on Indian Affairs, 95th Cong., 1st Sess., 1 (1977) ("It appears that for decades Indian parents and their children have been at the mercy of arbitrary or abusive action of local, State, Federal and private agency officials. Unwarranted removal of children from their homes is common in Indian communities").

[2] "The purpose of the bill (H. R. 12533), introduced by Mr. Udall et al., is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture and by providing for assistance to Indian tribes and organizations in the operation of child and family service programs." House Report, at 8 (footnote omitted). See also 124 Cong. Rec. 38102 (1978) (remarks of Rep. Udall) ("[The Act] clarifies the allocation of jurisdiction over Indian child custody proceedings between Indian tribes and the States. More importantly, it establishes minimum Federal standards and procedural safeguards to protect Indian families when faced with child custody proceedings against them in State agencies or courts").

vides that any party seeking to effect a foster care placement of, or involuntary termination of parental rights to, an Indian child must establish by stringent standards of proof that efforts have been made to prevent the breakup of the Indian family, and that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. §§ 1912(d), (e), (f). Each party to the proceeding has a right to examine all reports and documents filed with the court, and an indigent parent or custodian has the right to appointment of counsel. §§ 1912(b), (c). In the case of a voluntary termination, the ICWA provides that consent is valid only if given after the terms and consequences of the consent have been fully explained, may be withdrawn at any time up to the final entry of a decree of termination or adoption, and even then may be collaterally attacked on the grounds that it was obtained through fraud or duress. § 1913. Finally, because the Act protects not only the rights of the parents, but also the interests of the tribe and the Indian children, the Act sets forth criteria for adoptive, foster care, and preadoptive placements that favor the Indian child's extended family or tribe, and that can be altered by resolution of the tribe. § 1915.

The Act gives Indian tribes certain rights, not to restrict the rights of parents of Indian children, but to complement and help effect them. The Indian tribe may petition to transfer an action in state court to the tribal court, but the Indian parent may veto the transfer. § 1911(b).[3] The Act provides for a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. §§ 1911(c), 1912(a).[4] Finally, the tribe may petition the court to set aside a parental termination action upon a showing that the provisions of the ICWA that are designed to protect parents and Indian children have been violated. § 1914.[5]

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[3] The statute provides in part:

"(b) Transfer of proceedings; declination by tribal court

"In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe." 25 U. S. C. § 1911.

While the Act's substantive and procedural provisions effect a major change in state child custody proceedings, its jurisdictional provision is designed primarily to preserve tribal sovereignty over the domestic relations of tribe members and to confirm a developing line of cases which held that the tribe's exclusive jurisdiction could not be defeated by the temporary presence of an Indian child off the reservation. The legislative history indicates that Congress did not intend "to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits." House Report, at 19; Wamser, Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus, 10 N. M. L. Rev. 413, 416 (1980). The apparent intent of Congress was to overrule such decisions as that in *In re Cantrell*, 159 Mont. 66, 495 P. 2d 179 (1972), in which the State placed an Indian child, who had lived on a reservation with his mother, in a foster home only three days after he left the reservation to accompany his father on a trip. Jones, Indian Child Welfare: A Jurisdictional Approach, 21 Ariz. L. Rev. 1123, 1129 (1979). Congress specifically approved a series of cases in which the state courts declined jurisdiction over Indian children who were wards of the tribal court, *In re Adoption of Buehl*, 87 Wash. 2d 649, 555 P. 2d 1334 (1976); *Wakefield* v. *Little Light*, 276 Md. 333, 347 A. 2d 228 (1975), or whose parents were temporarily residing off the reservation, *Wisconsin Potowatomies of Hannahville Indian Community* v. *Houston*, 393 F. Supp. 719 (WD Mich. 1973), but exercised jurisdiction over Indian children who had never lived on a reservation and whose Indian parents were not then residing on a reservation, *In re Greybull*, 23 Ore. App. 674, 543 P. 2d 1079 (1975); see House Report, at 21.[6] It did not express any disapproval of decisions such as that of the United States Court of Appeals for the Ninth Circuit in *United States ex rel. Cobell* v. *Cobell*, 503 F. 2d 790 (1974), cert. denied, 421 U. S. 999 (1975), which indicated that a Montana state court could exercise jurisdiction over an Indian child custody dispute because the parents, "by voluntarily invoking the state court's jurisdiction for divorce purposes, . . . clearly submitted the question of their children's custody to the judgment of the Montana state courts." 503 F. 2d, at 795 (emphasis deleted).

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[4] See 44 Fed. Reg. 67584, 67586 (1979) ("The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones").

[5] Significantly, the tribe cannot set aside a termination of parental rights on the ground that the adoptive placement provisions of § 1915, favoring placement with the tribe, have not been followed.

The Report of the American Indian Policy Review Commission, an early proponent of the ICWA, makes clear the limited purposes that the term "domicile" was intended to serve:

> "Domicile is a legal concept that does not depend exclusively on one's physical location at any one given moment in time, rather it is based on the apparent intention of permanent residency. Many Indian families move back and forth from a reservation dwelling to border communities or even to distant communities, depending on em-

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[6] None of the cases cited approvingly by Congress involved a deliberate abandonment. In *Wakefield* v. *Little Light*, 276 Md. 333, 347 A. 2d 228 (1975), the court upheld exclusive tribal jurisdiction where it was clear that there was no abandonment. In *Wisconsin Potowatomies of Hannahville Indian Community* v. *Houston*, 393 F. Supp. 719 (WD Mich. 1973), there was no abandonment, the children had lived on the reservation and were members of the Indian Tribe, and the children's clothing and toys were at a home on the reservation that continued to be available to them. Finally, in *In re Adoption of Buehl*, 87 Wash. 2d 649, 555 P. 2d 1334 (1976), the child was a ward of the tribal court and an enrolled member of the Tribe.

> ployment and educational opportunities. . . . In these situations, where family ties to the reservation are strong, but the child is temporarily off the reservation, a fairly strong legal argument can be made for tribal court jurisdiction." Report on Federal, State, and Tribal Jurisdiction 86 (Comm. Print 1976).[7]

Although parents of Indian children are shielded from the exercise of state jurisdiction when they are temporarily off the reservation, the Act also reflects a recognition that allowing the tribe to defeat the parents' deliberate choice of jurisdiction would be conducive neither to the best interests of the child nor to the stability and security of Indian tribes and families. Section 1911(b), providing for the exercise of concurrent jurisdiction by state and tribal courts when the Indian child is not domiciled on the reservation, gives the Indian parents a veto to prevent the transfer of a state-court action to tribal court.[8] "By allowing the Indian parents to

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[7] In a letter to the House of Representatives, the Department of Justice explained its understanding that the provision was addressed to the involuntary termination of parental rights in tribal members by state agencies unaware of exclusive tribal jurisdiction:

"As you may be aware, the courts have consistently recognized that tribal governments have exclusive jurisdiction over the domestic relationships of tribal members located on reservations, unless a State has assumed concurrent jurisdiction pursuant to Federal legislation such as Public Law 83-280. It is our understanding that this legal principle is often ignored by local welfare organizations and foster homes in cases where they believe Indian children have been neglected, and that S. 1214 is designed to remedy this, and to define Indian rights in such cases." House Report, at 35.

[8] The explanation of this subsection in the House Report reads as follows:

"Subsection (b) directs a State court, having jurisdiction over an Indian child custody proceeding to transfer such proceeding, absent good cause to the contrary, to the appropriate tribal court upon the petition of the parents or the Indian tribe. Either parent is given the right to veto such transfer. The subsection is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure 'choose' the forum that will decide whether to sever the parent-child relationship, Congress promotes the security of Indian families by allowing the Indian parents to defend in the court system that most reflects the parents' familial standards." Jones, 21 Ariz. L. Rev., at 1141. As Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians, stated in testimony to the House Subcommittee on Indian Affairs and Public Lands with respect to a different provision:

> "The ultimate responsibility for child welfare rests with the parents and we would not support legislation which interfered with that basic relationship." Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess., 62 (1978).[9]

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that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." *Id.*, at 21.

In commenting on the provision, the Department of Justice suggested that the section should be clarified to make it perfectly clear that a state court need not surrender jurisdiction of a child custody proceeding if the Indian parent objected. The Department of Justice letter stated:

> "Section 101(b) should be amended to prohibit clearly the transfer of a child placement proceeding to a tribal court when any parent or child over the age of 12 objects to the transfer." *Id.*, at 32.

Although the specific suggestion made by the Department of Justice was not in fact implemented, it is noteworthy that there is nothing in the legislative history to suggest that the recommended change was in any way inconsistent with any of the purposes of the statute.

[9] Chief Isaac elsewhere expressed a similar concern for the rights of parents with reference to another provision. See Hearing, *supra* n. 1, at 158 (statement on behalf of National Tribal Chairmen's Association) ("We believe the tribe should receive notice in all such cases but where the child is neither a resident nor domiciliary of the reservation intervention should require the consent of the natural parents or the blood relative in whose custody the child has been left by the natural parents. It seems there is a great potential in the provisions of section 101(c) for infringing parental wishes and rights").

If J. B. and W. J. had established a domicile off the reservation, the state courts would have been required to give effect to their choice of jurisdiction; there should not be a different result when the parents have not changed their own domicile, but have expressed an unequivocal intent to establish a domicile for their children off the reservation. The law of abandonment, as enunciated by the Mississippi Supreme Court in this case, does not defeat, but serves the purposes of, the Act. An abandonment occurs when a parent deserts a child and places the child with another with an intent to relinquish all parental rights and obligations. Restatement (Second) of Conflict of Laws § 22, Comment *e* (1971) (hereinafter Restatement); *In re Adoption of Halloway*, 732 P. 2d 962, 966 (Utah 1986). If a child is abandoned by his mother, he takes on the domicile of his father; if the child is abandoned by his father, he takes on the domicile of his mother. Restatement § 22, Comment *e;* 25 Am. Jur. 2d, Domicil § 69 (1966). If the child is abandoned by both parents, he takes on the domicile of a person other than the parents who stands *in loco parentis* to him. *In re Adoption of Halloway, supra*, at 966; *In re Estate of Moore*, 68 Wash. 2d 792, 796, 415 P. 2d 653, 656 (1966); *Harlan* v. *Industrial Accident Comm'n*, 194 Cal. 352, 228 P. 654 (1924); Restatement § 22, Comment *i;* cf. *In re Guardianship of D. L. L. and C. L. L.*, 291 N. W. 2d 278, 282 (S. D. 1980).[10] To be effective, the intent to abandon or the actual physical abandonment must be shown by clear and convincing evidence. *In re Adoption of Halloway, supra*, at 966; *C. S.* v. *Smith*, 483 S. W. 2d 790, 793 (Mo. App. 1972).[11]

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[10] The authority of a State to exercise jurisdiction over a child in a child custody dispute when the child is physically present in a State and has been abandoned is also recognized by federal statute. See Parental Kidnaping Prevention Act of 1980, 94 Stat. 3569, 28 U. S. C. § 1738A(c)(2); see also Uniform Child Custody Jurisdiction Act, 9 U. L. A. § 3 (1988).

[11] The Court suggests that there could be no legally effective abandonment because the parents consented to termination of their parental rights before a judge of the state court and not a tribal court judge. *Ante*, at 51,

When an Indian child is temporarily off the reservation, but has not been abandoned to a person off the reservation, the tribe has an interest in exclusive jurisdiction. The ICWA expresses the intent that exclusive tribal jurisdiction is not so frail that it should be defeated as soon as the Indian child steps off the reservation. Similarly, when the child is abandoned by one parent to a person off the reservation, the tribe and the other parent domiciled on the reservation may still have an interest in the exercise of exclusive jurisdiction. That interest is protected by the rule that a child abandoned by one parent takes on the domicile of the other. But when an Indian child is deliberately abandoned by both parents to a person off the reservation, no purpose of the ICWA is served by closing the state courthouse door to them. The interests of the parents, the Indian child, and the tribe in preventing the unwarranted removal of Indian children from their families and from the reservation are protected by the Act's substantive and procedural provisions. In addition, if both parents have intentionally invoked the jurisdiction of the state court in an action involving a non-Indian, no interest in tribal self-governance is implicated. See *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 173 (1973); *Williams* v.

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n. 26. That suggestion ignores the findings of the State Supreme Court that the natural parents did virtually everything they could do to abandon the children to persons outside the reservation: "[T]he Indian twins have never resided outside of Harrison County, Mississippi, and were voluntarily surrendered and legally abandoned by the natural parents to the adoptive parents, and it is undisputed that the parents went to some efforts to prevent the children from being placed on the reservation as the mother arranged for their birth and adoption in Gulfport Memorial Hospital, Harrison County, Mississippi." 511 So. 2d 918, 921 (1987). In any event, even a consent to adoption that does not meet statutory requirements may be effective to constitute an abandonment and change the minor's domicile. See *Wilson* v. *Pierce*, 14 Utah 2d 317, 321, 383 P. 2d 925, 927 (1963); H. Clark, Law of Domestic Relations in the United States 633 (1968).

Lee, 358 U. S. 217, 219–220 (1959); *Felix* v. *Patrick*, 145 U. S. 317, 332 (1892).

The interpretation of domicile adopted by the Court requires the custodian of an Indian child who is off the reservation to haul the child to a potentially distant tribal court unfamiliar with the child's present living conditions and best interests. Moreover, it renders any custody decision made by a state court forever suspect, susceptible to challenge at any time as void for having been entered in the absence of jurisdiction.[12] Finally, it forces parents of Indian children who desire to invoke state-court jurisdiction to establish a domicile off the reservation. Only if the custodial parent has the wealth and ability to establish a domicile off the reservation will the parent be able to use the processes of state court. I fail to see how such a requirement serves the paramount congressional purpose of "promot[ing] the stability and security of Indian tribes and families." 25 U. S. C. § 1902.

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[12] The facts of *In re Adoption of Halloway*, 732 P. 2d 962 (Utah 1986), which the Court cites approvingly, *ante*, at 52–53, vividly illustrate the problem. In that case, the mother, a member of an Indian Tribe in New Mexico, voluntarily abandoned an Indian child to the custody of the child's maternal aunt off the reservation with the knowledge that the child would be placed for adoption in Utah. The mother learned of the adoption two weeks after the child left the reservation and did not object and, two months later, she executed a consent to adoption. Nevertheless, some two years after the petition for adoption was filed, the Indian Tribe intervened in the proceeding and set aside the adoption. The Tribe argued successfully that regardless of whether the Indian parent consented to it, the adoption was void because she resided on the reservation and thus the tribal court had exclusive jurisdiction. Although the decision in *Halloway*, and the Court's approving reference to it, may be colored somewhat by the fact that the mother in that case withdrew her consent (a fact which would entitle her to relief even if there were only concurrent jurisdiction, see 25 U. S. C. § 1913(c)), the rule set forth by the majority contains no such limitation. As the Tribe acknowledged at oral argument, any adoption of an Indian child effected through a state court will be susceptible of challenge by the Indian tribe no matter how old the child and how long it has lived with its adoptive parents. Tr. of Oral Arg. 15.

The Court concludes its opinion with the observation that whatever anguish is suffered by the Indian children, their natural parents, and their adoptive parents because of its decision today is a result of their failure to initially follow the provisions of the ICWA. *Ante,* at 53–54. By holding that parents who are domiciled on the reservation cannot voluntarily avail themselves of the adoption procedures of state court and that all such proceedings will be void for lack of jurisdiction, however, the Court establishes a rule of law that is virtually certain to ensure that similar anguish will be suffered by other families in the future. Because that result is not mandated by the language of the ICWA and is contrary to its purposes, I respectfully dissent.

AMERADA HESS CORP. ET AL. v. DIRECTOR, DIVISION OF TAXATION, NEW JERSEY DEPARTMENT OF THE TREASURY

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 87-453. Argued November 29, 1988—Decided April 3, 1989*

Appellant oil companies do business in New Jersey and are subject to that State's Corporation Business Tax. They are also subject to the federal windfall profit tax on their crude-oil production, which does not occur in New Jersey. They each sought a deduction for the federal tax in calculating "entire net income" on their 1980 and 1981 state tax returns, but appellee, the Director of the New Jersey Division of Taxation, assessed deficiencies on the ground that the "add-back" provision of the state tax statute prohibited corporations from deducting a federal tax that is "on or measured by profits or income." The State Tax Court affirmed the assessments, but the Appellate Division of the State Superior Court reversed. The State Supreme Court in turn reversed and reinstated the Tax Court's judgment, holding that the windfall profit tax is measured by "profits or income" for the purposes of the add-back provision and that, as so construed, that provision did not violate the Commerce Clause or the Fourteenth Amendment to the Federal Constitution.

Held:

1. The New Jersey tax satisfies all four elements of the test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, and therefore passes Commerce Clause scrutiny even though the add-back provision denies appellants deductions for windfall profit tax payments. Pp. 72-79.

(a) New Jersey has a "substantial nexus" with the activities that generate appellants' "entire net income," including oil production occurring entirely outside the State, since each appellant's New Jersey operations are part of an integrated "unitary business" that includes crude-oil production. P. 73.

(b) The tax is fairly apportioned, since the part of the "entire net income" to be taxed is determined according to the standard three-factor apportionment formula that this Court has expressly approved. See, *e. g., Container Corp. of America* v. *Franchise Tax Board*, 463 U. S.

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*Together with No. 87-464, *Texaco Inc. et al.* v. *Director, Division of Taxation, New Jersey Department of the Treasury*, also on appeal from the same court.

159, 170. The use of the formula as applied to appellants is not invalid on the ground that the windfall profit tax is an exclusively out-of-state expense, since the costs of a unitary business cannot be deemed confined to the locality in which they are incurred. *Id.*, at 182. Pp. 73–75.

(c) The tax does not discriminate against interstate commerce. The add-back provision is not facially discriminatory, since there is no explicit discriminatory design to the tax. Nor does the provision apply exclusively to a localized industry, since it generally excludes any federal tax "on or measured by income or profits," including the nationwide federal income tax. Moreover, appellants concede that no discriminatory motive underlies the provision, which cannot be held to exert pressure on an interstate business to conduct more of its activities in New Jersey. Pp. 75–79.

(d) The tax is "fairly related" to the benefits the State provides appellants, including police and fire protection, a trained work force, and the advantages of a civilized society. P. 79.

2. The New Jersey tax does not violate the Fourteenth Amendment. Pp. 79–80.

107 N. J. 307, 526 A. 2d 1029, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, STEVENS, and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 80. O'CONNOR, J., took no part in the consideration or decision of the cases.

Mark L. Evans argued the cause for appellants in both cases. With him on the briefs were *Robert L. Moore II*, *James P. Tuite*, *Charles M. Costenbader*, *Charles H. Friedrich III*, *Laurence Reich*, *Frederic K. Becker*, *Robert E. McManus*, *James R. Ron*, *Tom O. Foster III*, *Paul Wehrle*, *John A. Carrig*, and *William D. Peltz*.

Mary R. Hamill, Deputy Attorney General of New Jersey, argued the cause for appellee in both cases. With her on the brief were *Cary Edwards*, Attorney General, *John P. Miscione* and *Sarah T. Darrow*, Deputy Attorneys General, *Martin Lobel*, and *James F. Flug*.†

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†Briefs of *amici curiae* urging reversal were filed for the American Mining Congress et al. by *William L. Goldman* and *James A. Riedy;* and for the Committee on State Taxation of the Council of State Chambers of

JUSTICE BLACKMUN delivered the opinion of the Court.

Appellants in this litigation are 13 major oil companies that do business in the State of New Jersey. They are subject to New Jersey's Corporation Business Tax. They also are subject to the federal windfall profit tax imposed on producers of crude oil. None of appellants' oil production takes place in New Jersey.

Each appellant has sought to deduct its federal windfall profit tax in calculating "entire net income" for purposes of the New Jersey Corporation Business Tax. Under the applicable New Jersey statute, however, a corporation may not deduct a federal tax that is "on or measured by profits or income." The Supreme Court of New Jersey ruled that the windfall profit tax is a tax "on or measured by profits or income." The question before us is whether, as so construed, the New Jersey provision runs afoul of the Commerce Clause or of the Fourteenth Amendment to the United States Constitution.

I

A

In conjunction with the decontrol of oil prices, Congress enacted the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. 96–223, Tit. I, 94 Stat. 230, now codified as 26 U. S. C.

Commerce by *E. Susan Garsh*, *John S. Brown*, *Jody E. Forchheimer*, *Stephen A. Bokat*, *Jan S. Amundson*, *Jean A. Walker*, and *Paul H. Frankel*.

A brief of *amici curiae* urging affirmance was filed for the State of Iowa et al. by *Thomas J. Miller*, Attorney General of Iowa, *Harry M. Griger*, Special Attorney General, and *Marcia Mason*, Assistant Attorney General, joined by the Attorneys General for their respective States as follows: *John K. Van de Kamp* of California, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *James T. Jones* of Idaho, *Frank J. Kelley* of Michigan, *Mike Greely* of Montana, *Robert Abrams* of New York, *Nicholas J. Spaeth* of North Dakota, *James E. O'Neil* of Rhode Island, *T. Travis Medlock* of South Carolina, and *Joseph B. Meyer* of Wyoming.

Solicitor General Fried, *Deputy Solicitor General Wallace*, and *Richard G. Taranto* filed a brief for the United States as *amicus curiae*.

§§4986–4998 (Act).[1] The Act imposes a tax on the "windfall profit" that a crude-oil producer receives from the oil it produces. The "windfall profit" for each barrel of oil is essentially the difference between (a) the deregulated price for the oil (that is, its actual sales price)[2] and (b) the regulated price that would have applied had decontrol not taken place.[3]

One significant provision of the Act, known as the "net income limitation," places a cap on the amount of a producer's windfall profit that may be taxed each year: "The windfall profit on any barrel of crude oil shall not exceed 90 percent of the net income attributable to such barrel." §4988(b)(1). The net income attributable to each barrel is the taxable income derived from the oil removed from a particular property for a given year divided by the number of barrels from that property taken into account for that year. §4988(b)(2).[4]

Congress specifically has provided that, for federal income tax purposes, the windfall profit tax *is* deductible. 26

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[1] See Joint Committee on Taxation, General Explanation of the Crude Oil Windfall Profit Tax Act of 1980, 96th Cong., 2d Sess., 6 (Jt. Comm. Print 1981); S. Rep. No. 96–394, p. 6 (1979); H. R. Rep. No. 96–304, p. 4 (1979).

[2] If the oil is converted into a refined product before it is sold, or if it is removed from the producer's premises before it is sold, the oil is assigned a "constructive sales price," 26 U. S. C. §4988(c)(3), which is "the representative market or [field] price of the oil . . . before conversion or transportation." 26 CFR §1.613–3(a) (1988).

[3] The Act defines "windfall profit" as "the excess of the removal price of the barrel of crude oil over the sum of—(1) the adjusted base price of such barrel, and (2) the amount of the severance tax adjustment with respect to such barrel provided by section 4996(c)." 26 U. S. C. §4988(a). The "adjusted base price" is derived from the price of the oil in 1979, adjusted for inflation. §4989. The "severance tax adjustment" is the amount by which any severance tax imposed on the oil exceeds the severance tax that would have been imposed if the oil had been valued at its adjusted base price. §4996(c).

[4] The annual taxable income for an oil-producing property is determined by reference to §613(a) of the Internal Revenue Code of 1954, 26 U. S. C. §613(a). See §4988(b)(3)(A).

U. S. C. § 164(a)(4) (1982 ed., Supp. V). Although Congress may have assumed that "the windfall profit tax generally would be deductible under State income taxes," see H. R. Rep. No. 96–304, p. 9 (1979), the Act does not *require* a State, in imposing a tax, to allow the deduction.

B

New Jersey's Corporation Business Tax Act, N. J. Stat. Ann. § 54:10A–1 *et seq.* (West 1986), imposes a tax on a portion of the "entire net income" of a corporation "for the privilege of doing business, employing or owning capital or property, or maintaining an office in this State." § 54:10A–2. For a corporation doing business both within and outside New Jersey, the portion of the "entire net income" to be taxed is determined according to a three-factor formula concerning property, receipts, and payroll. The formula calls for the average of three ratios: in-state property to total property; in-state to total receipts; and in-state to total wages, salaries, and other forms of employee compensation. § 54:10A–6. Cf. *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267 (1978).

Under the Corporation Business Tax Act, a corporation's "entire net income" is presumptively the same as its federal taxable income "before net operating loss deduction and special deductions." § 54:10A–4(k). The statute also provides: "Entire net income shall be determined without the exclusion, deduction, or credit of . . . [t]axes paid or accrued to the United States on or measured by profits or income." *Ibid.* The New Jersey Legislature adopted this "add-back" provision in 1958, long before Congress enacted the windfall profit tax in 1980. 1958 N. J. Laws, ch. 63. See 107 N. J. 307, 313, 526 A. 2d 1029, 1032 (1987).

C

In reporting to New Jersey its "entire net income" for 1980 and 1981, each of the appellants did not "add back" the amount of its federal windfall profit tax. In effect, then, each appellant claimed a deduction for that tax from its "entire net income." As a result, appellee, the Director of the New Jersey Division of Taxation, assessed deficiencies.[5] Appellants then brought suit against appellee in the Tax Court of New Jersey.[6] They contended, first, that the windfall profit tax was not a "tax on or measured by profits or income," within the meaning of the add-back provision, and, second, that a contrary construction of the add-back provision would contravene the Federal Constitution.

The Tax Court rejected these contentions and affirmed the deficiency assessments. 7 N. J. Tax 51 (1984). A consolidated motion for reconsideration was denied. 7 N. J. Tax 275 (1985). The Appellate Division of the Superior Court of New Jersey reversed, holding that the windfall profit tax was not a tax on or measured by profits or income, and, therefore, that it could be deducted from entire net income. 208 N. J. Super. 201, 505 A. 2d 186 (1986).

The Supreme Court of New Jersey, in its turn, reversed and reinstated the Tax Court's judgment. 107 N. J. 307, 526 A. 2d 1029 (1987). The five participating justices in a unanimous opinion held that the windfall profit tax is a tax measured by "profits or income" for the purposes of the add-back provision. The court first observed that there obviously was no significant legislative intent on the point, given the fact that the add-back provision predated the windfall profit tax by over 20 years. *Id.*, at 313, 526 A. 2d, at 1032. Lacking evidence of legislative intent, the court went on to reason that the windfall profit tax was a tax on "income" or "profits" as a matter of both ordinary usage and "economic sense."

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[5] At issue in these cases are the 1980 taxes of all 13 appellants and the 1981 taxes of 5 of them. Appellee has deferred action on the 1981 taxes of the other 8 appellants pending the final outcome of this litigation.

[6] The Tax Court consolidated 14 separate complaints raising identical issues. See 7 N. J. Tax 51, 53 (1984). Thirteen of those fourteen original plaintiffs remain parties to this litigation.

Id., at 324, 331, 526 A. 2d, at 1038, 1042. The court noted that the windfall profit tax, by its terms, is limited to "that increment of [an oil producer's] income representing the excess of the uncontrolled price of oil over the controlled price." *Id.*, at 326, 526 A. 2d, at 1040. Also, because of the net income limitation provision, the court concluded that the amount taxed under the windfall profit tax cannot exceed a producer's "net income per barrel." *Id.*, at 328, 526 A. 2d, at 1041. For these reasons, the court found it appropriate to classify the windfall profit tax as measured by income or profits.

Having determined that the add-back provision applied to the windfall profit tax, the court rejected appellants' federal constitutional challenge. "Because the denial of a deduction for the [windfall profit tax] was not based on the interstate nature of [appellants'] businesses and did not burden out-of-state companies, consumers, or transactions while favoring in-state activities, the disallowance did not discriminate against interstate commerce." *Id.*, at 338, 526 A. 2d, at 1046.

Appellants now press their federal constitutional claims in this Court. After first seeking the views of the Solicitor General of the United States, 484 U. S. 942 (1987), we noted probable jurisdiction. 486 U. S. 1004 (1988).

II

In *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), this Court sustained a state tax "against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." We repeatedly have applied this principle in subsequent cases, most recently this Term in *Goldberg* v. *Sweet*, 488 U. S. 252 (1989). See also *id.*, at 260, n. 12 (citing other applications of the principle). Appellants do not dispute the soundness of the *Complete Auto* standard or the propriety of its application here. See Brief for Appellants 21. Rather, they argue that the New Jersey Corporation Business Tax, in denying them a deduction for windfall profit tax payments, fails each of the four prongs of the *Complete Auto* test. We disagree.

A

There can be no doubt that New Jersey has "a substantial nexus" with the activities that generate appellants' "entire net income," including oil production occurring entirely outside the State. Each appellant's New Jersey operations are part of an integrated "unitary business," which includes the appellant's crude-oil production. Reply Brief for Appellants 3. Consequently, there exists a "clear and sufficient nexus between [each] appellant's interstate activities and the taxing State." *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, 225 (1980). That New Jersey denies a deduction for windfall profit tax does not change this conclusion. Denying a deduction for a cost associated with the production of oil cannot alter the fact that New Jersey has a substantial connection to the oil-producing activity, by virtue of the determination that this activity is conducted by a unitary business.

B

Nor has New Jersey imposed upon appellants an unfairly apportioned tax. New Jersey employs an apportionment formula that averages the percentages of in-state property, receipts, and payroll. See Part I–B, *supra*. We have expressly approved this apportionment formula in the past. See, *e. g.*, *Container Corp. of America* v. *Franchise Tax Board*, 463 U. S. 159, 170 (1983). Indeed, this three-factor formula "has become . . . something of a benchmark against which other apportionment formulas are judged." *Ibid.*

The use of this formula is not invalid as applied to appellants simply because New Jersey denies a deduction for windfall profit tax payments. Appellants contend otherwise, asserting that the windfall profit tax is an exclusively out-of-state expense because it is associated with the production of oil outside New Jersey. They argue that the denial of a deduction for an out-of-state expense causes a State to tax more than its fair share of a unitary business' income. Brief for Appellants 4, 15.

Appellants, however, underestimate the fact that, for apportionment purposes, it is inappropriate to consider the windfall profit tax as an out-of-state expense. Rather, just as each appellant's oil-producing revenue—as part of a unitary business—is not confined to a single State, *Exxon Corp.*, 447 U. S., at 226; Brief for Appellants 3, so too the costs of producing this revenue are unitary in nature. See *Container Corp.*, 463 U. S., at 182 (the costs of a unitary business cannot be deemed confined to the locality in which they are incurred). Thus, when a State denies a deduction for a cost of a unitary business, the resulting net figure is still a unitary one, which a State may legitimately decide to apportion according to the standard three-factor apportionment formula.[7]

It may be that the application of this formula to appellants results in a somewhat "imperfect" measure of the New Jersey component of their unitary net income. *Id.*, at 183. But this fact alone does not render the tax on appellants unlawful. "The Constitution does not 'invalidat[e] an apportionment formula whenever it *may* result in taxation of some income that did not have its source in the taxing State.'"

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[7] Appellee contends that the windfall profit tax is not "site-specific" because three essential attributes of the tax do not depend on any particular location: the calculation of "removal price" (which may be constructed from market price of the oil in places far from the site at which the oil was removed from the ground); the inflation-adjustment factor; and the net income limitation. See Brief for Appellee 26–33. Whatever the merits of these contentions, we think it is unnecessary to reach them. For fair-apportionment purposes, the relevant question is whether the windfall profit tax is a cost of a unitary business, rather than what the attributes of that cost may be.

Id., at 169–170, quoting *Moorman Mfg. Co.* v. *Bair*, 437 U. S., at 272 (emphasis added in *Container Corp.*). On the contrary, as we have said repeatedly, in order to show unfair apportionment, a taxpayer "must demonstrate that there is no rational relationship between the income attributed to the State and the intrastate values of the enterprise" (internal quotation marks omitted). *Container Corp.*, 463 U. S., at 180. Given the unitary nature of appellants' oil-producing activities, coupled with New Jersey's use of the benchmark apportionment formula, appellants have not met this burden.[8]

C

Even if a tax is fairly apportioned, it may discriminate against interstate commerce. *Westinghouse Electric Corp.* v. *Tully*, 466 U. S. 388, 398–399 (1984). As our precedents show, a tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce. See generally Smith, State Discriminations against Interstate Commerce, 74 Calif. L. Rev. 1203, 1239 (1986). In *Tully*, for example, we considered a New York income tax provision that expressly provided a tax credit for shipping products from New York rather than other States. Although the tax was fairly apportioned, the tax credit, "on its face, [was] designed to have discriminatory economic effects" and thus was invalid under the Commerce Clause. 466 U. S., at 406–407.

Of course, a tax provision need not be facially discriminatory in the *Tully* sense in order to violate the Commerce Clause. For example, in *Bacchus Imports, Ltd.* v. *Dias*, 468

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[8] We note, too, that if every State denied a deduction for windfall profit tax payments while applying the three-factor formula, the result would not be equivalent to an unapportioned tax, imposed by a single State on an oil company's entire net income. In other words, "no multiple taxation would result" from more than one State's following New Jersey's lead. See *Goldberg* v. *Sweet*, 488 U. S. 252, 260–265 (1989) (discussing a tax to which no apportionment formula was applied).

U. S. 263 (1984), a Hawaii statute exempted from the State's liquor tax a brandy distilled from the root of a shrub indigenous to Hawaii. Because this was a local product, the tax exemption did not need to be drafted explicitly along state lines in order to demonstrate its discriminatory design.

Bacchus Imports also involved a tax exemption for fruit wine. Although this exemption was general in nature and did not specify an indigenous product, there was evidence that it was enacted to promote the local pineapple-wine industry. *Id.*, at 270–271. Thus, because the exemption was motivated by an intent to confer a benefit upon local industry not granted to out-of-state industry, the exemption was invalid.

Finally, *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266 (1987), concerned, among other things, an unapportioned Pennsylvania axle tax on the use of Pennsylvania highways by trucks over 26,000 pounds. Although this "flat" tax applied to both in-state and out-of-state trucks, it nonetheless had a discriminatory effect by exerting "an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States,'" *id.*, at 287, quoting U. S. Const., Art. I, § 8, cl. 3. See also *Halliburton Oil Well Co.* v. *Reily*, 373 U. S. 64, 72 (1963) (Louisiana statute had the discriminatory effect of imposing a greater tax on the same goods if they were manufactured outside Louisiana than if they were manufactured within the State, thereby creating an incentive to locate the manufacturing process within the State).

New Jersey's add-back provision, however, does not contravene any of the principles articulated in these cases. It obviously is not facially discriminatory in the *Tully* sense, as there is no explicit discriminatory design to the tax. Nor does it apply exclusively to a localized industry, as in *Bacchus Imports*. Instead, the add-back provision applies generally to any federal tax "on or measured by income or profits." Thus, it includes the federal income tax, as well as the windfall profit tax.[9] The federal income tax, of course, applies to corporate activity throughout the Nation. Consequently, what could be said of the statute in *Bacchus Imports* cannot be said of the add-back provision: that it discriminates on the basis of geographic location. See 468 U. S., at 271.

Appellants, it seems to us, miss this essential point. They argue: "The question here is whether a state may single out for special tax burdens a form of business activity that is conducted only in other jurisdictions." Brief for Appellants 44. But this question is *not* presented in this litigation. The add-back provision does not single out the windfall profit tax for a deduction denial, and we need not consider here whether a statute that did so would impermissibly discriminate against interstate commerce.

Moreover, appellants concede that no discriminatory motive underlies the add-back provision. Tr. of Oral Arg. 21. Nor does the add-back provision exert a pressure on an interstate business to conduct more of its activities in New Jersey. Denying a deduction for windfall profit tax payments cannot create oil reserves where none exist and therefore cannot be considered an incentive for oil producers to move their oil-producing activities to New Jersey. Given these attributes of the add-back provision, it is difficult to see how it unconstitutionally discriminates against interstate commerce.

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[9] Appellants also contend that the windfall profit tax is not "comparable" to the federal income tax. Brief for Appellants 35. But we certainly do not find the State's treatment of the windfall profit tax as "on or measured by income or profits" irrational or arbitrary. In significant respects, the windfall profit tax is similar to a tax on income. First, by taxing only the difference between the deregulated and regulated price for the oil, the windfall profit tax was intended to reach only the excess income derived from oil production as a result of decontrol. H. R. Rep. No. 96–304, p. 7 (1979). Second, the net income limitation exists precisely to assure that the tax is imposed only upon above-cost receipts. S. Rep. No. 96–394, p. 29 (1979). Moreover, although the Act itself characterizes the windfall profit tax as an "excise tax," 26 U. S. C. § 4986(a), the Internal Revenue Service states that the tax's "structure and computation bear more resemblance to an income tax." IRS Manual Supplement—Windfall Profit Tax Program, 42 RDD-57 (Rev. 3) ¶ 2.01 (Aug. 28, 1987), reprinted in 2 CCH Internal Revenue Manual—Audit, p. 7567 (1987). Because the IRS believes that the windfall profit tax resembles an income tax, it surely is not irrational for New Jersey to classify the windfall profit tax, along with the federal income tax, as part of a general provision relating to federal taxes "on or measured by income or profits."

Appellants nonetheless claim that the add-back provision, by denying a deduction for windfall profit tax payments, discriminates against oil producers who market their oil in favor of independent retailers who do not produce oil. But whatever disadvantage this deduction denial might impose on integrated oil companies does not constitute discrimination against interstate commerce. Appellants operate both in New Jersey and outside New Jersey. Similarly, nonproducing retailers may operate both in New Jersey and outside the State. Whatever different effect the add-back provision may have on these two categories of companies results solely from differences between the nature of their businesses, not from the location of their activities. See *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 125–129 (1978) (prohibiting oil producers from retailing oil in Maryland does not impermissibly burden interstate commerce because independent interstate retailers still may compete with purely local retailers). In this respect, we agree with the analysis of the New Jersey Supreme Court. 107 N. J., at 337–338, 526 A. 2d, at 1046.[10]

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[10] The Solicitor General of the United States has suggested that denying a deduction for windfall profit tax payments might impermissibly give appellants an incentive to shift operations from oil production, which does not occur in New Jersey, to activities that do occur in New Jersey. Brief for United States as *Amicus Curiae* 18. But even if this deduction denial caused appellants to shift from oil production, there is no evidence that appellants would shift to other New Jersey activities, rather than non-oil-producing activities outside New Jersey. Indeed, precisely because the deduction denial results in a larger New Jersey tax for appellants, it creates some incentive for appellants to move their operations out of that

For all these reasons, we conclude that the add-back provision does not discriminate against interstate commerce.

D

There is also no doubt that New Jersey's Corporation Business Tax is "fairly related" to the benefits that New Jersey provides appellants, "which include police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'" *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S., at 228, quoting *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 445 (1979). Appellants acknowledge, as they must, that New Jersey may impose a reasonable tax on a portion of their "unitary business" income. Brief for Appellants 3. That New Jersey denies a deduction for windfall profit tax payments "does not alter the fact that the . . . tax paid by [appellants] . . . is related to the advantages provided by the State which aid [each] appellant's business." *D. H. Holmes Co.* v. *McNamara*, 486 U. S. 24, 32 (1988).

In sum, then, the Corporation Business Tax imposed on appellants satisfies all four elements of the *Complete Auto* test, even considering that the add-back provision denies a deduction for windfall profit tax payments.

III

Appellants also contend that, by denying a deduction for windfall profit tax payments, the add-back provision violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In light of the foregoing discussion, this contention is plainly meritless. First, appellants recognize that the *Complete Auto* test encompasses due process standards. Brief for Appellants 21; see also 1 J. Hellerstein,

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State. Thus, in the absence of discriminatory intent or a statute directed specifically at economic activity that occurs only in a particular location (as in *Bacchus Imports*), a deduction denial does not unduly burden interstate commerce just because the deduction denied relates to an economic activity performed outside the taxing State.

State Taxation ¶4.8, p. 123 (1983). Accordingly, having determined that the Corporation Business Tax passes all four prongs of the *Complete Auto* test, we also conclude that it does not violate due process.

Second, although some forms of discriminatory state taxation may violate the Equal Protection Clause even when they pose no Commerce Clause problem, see *Metropolitan Life Ins. Co.* v. *Ward*, 470 U. S. 869, 881 (1985), the add-back provision is not among them. In contrast to *Ward*, there is no discriminatory classification underlying the add-back provision. Moreover, there is unquestionably a rational basis for the State's refusal to allow a deduction for federal windfall profit tax.

IV

There being no constitutional infirmity to the add-back provision as authoritatively construed by the Supreme Court of New Jersey, the judgment of that court is affirmed.

It is so ordered.

JUSTICE O'CONNOR took no part in the consideration or decision of these cases.

JUSTICE SCALIA, concurring in the judgment.

I agree with the Court's determination that the New Jersey Corporation Business Tax does not facially discriminate against interstate commerce. See *ante*, at 76–77. Since I am of the view that this conclusion suffices to decide a claim that a state tax violates the Commerce Clause, see *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 304 (1987) (SCALIA, J., dissenting), I would refrain from applying, for Commerce Clause purposes, the remainder of the analysis articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977). To the extent, however, that the *Complete Auto* analysis pertains to the due process requirements that there be "a 'minimal connection' between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise," *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425, 436–437 (1980) (citation omitted), I agree with the Court's conclusion that those requirements have been met. See *ante*, at 79–80. Finally, for the reasons set forth in Part III of the Court's opinion, I agree that the tax in this case does not violate the Equal Protection Clause.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR MANNING SAVINGS AND LOAN ASSOCIATION *v.* TICKTIN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 87-1865. Argued February 27, 1989—Decided April 3, 1989

The Federal Savings and Loan Insurance Corp. (FSLIC), in its capacity as receiver of a state-chartered savings and loan association, brought an action in Federal District Court against former directors of the association for breach of their fiduciary duties under Illinois law. The District Court held that it had jurisdiction pursuant to 28 U. S. C. § 1345, which specifies that, except as "otherwise provided" by federal law, district courts have jurisdiction of all civil actions "commenced by" a federal agency "expressly authorized to sue" by Act of Congress. The Court of Appeals reversed, holding that a proviso in 12 U. S. C. § 1730(k)(1) withdraws federal jurisdiction in cases in which the FSLIC "is a party in its capacity as . . . receiver . . . of an insured State-chartered institution" if the suit "involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law."

Held: The District Court has jurisdiction over the FSLIC's action. Pp. 84–87.

(a) In view of the fact that this case was "commenced by" a federal agency "expressly authorized to sue" under 12 U. S. C. § 1725(c), § 1345 supports the District Court's jurisdiction unless § 1730(k)(1) "otherwise provide[s]." Pp. 84–85.

(b) A limitation on § 1345's jurisdictional grant is not "otherwise provided" by § 1730(k)(1), the proviso of which declares that FSLIC receivership cases involving specified parties and state-law rights "shall not be deemed to arise under the laws of the United States." The proviso does not apply to clause (A) of § 1730(k)(1)—which states that the FSLIC "shall be deemed to be an agency of the United States" and thereby confirms that § 1345's party-based jurisdiction is applicable in cases brought by the FSLIC—since that clause does not rely on the presence of a federal question as a jurisdictional prerequisite. Rather, the proviso imposes a limit on the grant of federal-question jurisdiction set forth in clauses (B) and (C) of § 1730(k)(1), which declare respectively that any civil suit in which the FSLIC is a party "shall be deemed to arise under the laws of the United States," and that the FSLIC has the right to remove "any such action" from state to federal court. Pp. 85–87.

832 F. 2d 1438, reversed.

STEVENS, J., delivered the opinion for a unanimous Court.

Richard G. Taranto argued the cause for petitioner. With him on the brief were *Solicitor General Fried, Deputy Solicitor General Merrill*, and *David A. Felt*.

James B. Koch argued the cause for respondents. With him on the brief were *Joseph J. Ticktin, pro se*, and *Irving Faber*.

JUSTICE STEVENS delivered the opinion of the Court.

The Federal Savings and Loan Insurance Corporation (FSLIC), in its capacity as receiver of a state-chartered savings and loan association (Association), brought this action in Federal District Court against former directors of the Association claiming damages for breach of their fiduciary duties under Illinois law. The District Court, relying on Circuit precedent,[1] held that it had jurisdiction of the case pursuant to 28 U. S. C. § 1345 because the FSLIC is an agency of the United States. App. 38–46. However, observing that there was substantial ground for difference of opinion on this controlling question of law, the court certified the jurisdictional question for interlocutory appeal. *Id.*, at 39–46. The Court of Appeals for the Seventh Circuit reversed because it concluded that a proviso included in 20 Stat. 1042, 12 U. S. C. § 1730(k)(1), withdraws federal jurisdiction in cases in which the FSLIC "is a party in its capacity as . . . receiver . . . of an insured State-chartered institution" if the suit "involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law."[2] 832 F. 2d 1438 (1987). Since that ruling, if correct, will require dismissal of a large number of cases concerning the integrity of our financial institutions, we granted certiorari. 488 U. S. 815 (1988).

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[1] The District Court relied on the Seventh Circuit's opinion in *FSLIC* v. *Krueger*, 435 F. 2d 633 (1970). On appeal, the Seventh Circuit overruled the pertinent holding of *Krueger*. 832 F. 2d 1438 (1987).

We resolve the jurisdictional issue by first considering the meaning of 28 U. S. C. § 1345 and then asking whether 12 U. S. C. § 1730(k)(1) enlarges or contracts the grant of federal jurisdiction in cases commenced by the FSLIC.

I

Federal jurisdiction over cases commenced by federal agencies is conferred by 28 U. S. C. § 1345. That section provides:

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[2] Title 12 U. S. C § 1730(k)(1) provides:

"Notwithstanding any other provision of law, (A) the Corporation shall be deemed to be an agency of the United States within the meaning of section 451 of title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States.* No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit, or proceeding in any court of any State or of the United States or any territory, or any other court." (Emphasis supplied.)

Title 28 U. S. C. § 451, in turn, provides in relevant part:

"The term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense."

> "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

Three limits on this grant of jurisdiction are plain from its text. It applies only to civil litigation "commenced" by the federal party; it requires that the agency be "expressly authorized to sue"; and it is subject to such exceptions as may be "otherwise provided by Act of Congress." In view of the fact that this case was commenced by the FSLIC, and the fact that the FSLIC is expressly authorized to sue and be sued,[3] § 1345 supports federal jurisdiction unless another statute otherwise provides. The question, then, is whether 12 U. S. C. § 1730(k)(1) is such a statute.

II

The text of § 1730(k)(1)[4] indicates that it is a statute that confirms and enlarges federal-court jurisdiction over cases to which the FSLIC is a party. It does so in two ways.

Prior to the enactment of § 1730(k)(1) in 1966, at least one court had expressed some doubt concerning the FSLIC's status as an agency of the United States for purposes of asserting jurisdiction under § 1345. See *Acron Investments, Inc.* v. *FSLIC*, 363 F. 2d 236 (CA9), cert. denied, 385 U. S. 970 (1966). Clause (A) of the statute removed that doubt. The manifest purpose of enacting clause (A) was to foreclose the possible argument that § 1345 does not confer federal agency jurisdiction in cases brought by the FSLIC. Thus, clause (A) lends added support to the jurisdictional basis found in § 1345.

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[3] Title 12 U. S. C. § 1725(c) provides that the FSLIC "shall have power . . . [t]o sue and be sued, complain and defend, in any court of competent jurisdiction in the United States . . . ."

[4] See n. 2, *supra*.

In addition, clause (B) enlarges the category of FSLIC litigation over which federal courts have jurisdiction because it covers all civil cases in which the FSLIC "shall be a party," whereas § 1345 applies only to those "commenced" by the FSLIC. Thus, the grant of federal jurisdiction in § 1345 is expanded to include cases in which the FSLIC is named as a defendant as well as those in which it intervenes after proceedings are underway. Clause (C) further enlarges federal jurisdiction in cases involving the FSLIC by giving the agency the right to remove civil proceedings from state court to the appropriate federal district court. Thus, placing the proviso to one side for the moment, it is evident that each of the three clauses of § 1730(k)(1) was intended to buttress the FSLIC's access to a federal forum.

There is no doubt that the proviso imposes a limit on this broad grant of federal jurisdiction. It is equally clear, however, that the proviso does not extend to clause (A) and the agency jurisdiction conferred by § 1345. Clause (B) provides that any civil suit in which the FSLIC is a party "shall be deemed to arise under the laws of the United States." Clause (C), in turn, permits the FSLIC to remove "any such action" to federal court. Accordingly, these jurisdictional grants are predicated on the congressional finding that actions to which the FSLIC is a party "shall be deemed to arise under the laws of the United States." The proviso qualifies this finding by describing a subcategory of cases to which the FSLIC is a party that "shall *not* be deemed to arise under the laws of the United States." (Emphasis supplied.) Clause (A), however, does not rely on the presence of a federal question as a jurisdictional prerequisite, but rather confirms that the party-based jurisdiction of § 1345 is applicable in cases brought by the FSLIC. As a result, the proviso's partial retraction of federal-question jurisdiction has no effect on clause (A), and, *a fortiori,* no effect on § 1345.[5]

The Court of Appeals suggested that notwithstanding the plain language of the statute, Congress must have intended that the proviso apply to clause (A). 832 F. 2d, at 1443–1444. The court reasoned that because clause (B) applies to all civil cases in which the FSLIC is a party—whether as plaintiff or defendant—and because Congress intended to limit this grant of jurisdiction in the manner set out in the proviso, Congress must have intended that the proviso apply to clause (A) as well. To read the proviso otherwise, the court explained, would allow clause (A) "to grant jurisdiction indirectly in those cases that were deliberately and specifically excluded from the jurisdiction granted by part B." *Id.*, at 1444. The problem with this argument is that in an attempt to give the proviso full effect as applied to each class of cases that might fall within clause (B), the court renders clause (A) entirely redundant. Moreover, reading the proviso so as not to apply to clause (A) does not fail to give the proviso full effect as applied to clause (B). Clause (B) provides federal-question jurisdiction in any case in which the FSLIC is a party and the proviso limits this grant. The fact that clause (A) and § 1345 may provide agency jurisdiction in some of these same cases does not change the fact that the proviso has a real effect—it removes one basis of jurisdiction. We thus conclude that the language of § 1730(k)(1) not only plainly provides that the proviso does not apply to clause (A), but also is given its fullest effect by so reading the statute.

Because the proviso does not apply to clause (A), § 1730 (k)(1) is not an Act of Congress that has "otherwise provided" a limitation on the jurisdictional grant in § 1345. Accordingly, the District Court has federal agency jurisdiction over the FSLIC's action.[6]

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[5] Had Congress intended to limit not only the federal-question jurisdiction of clauses (B) and (C) but also the party-based jurisdiction of § 1345, it could easily have drafted a more general proviso asserting that the defined subclass of cases "shall not fall within the federal jurisdiction."

The judgment of the Court of Appeals is reversed.

It is so ordered.

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[6] Because we conclude that the proviso does not modify clause (A) and that jurisdiction was thus properly asserted under § 1345, we need not address the FSLIC's alternative arguments that the proviso is inapplicable because this suit does not involve "only . . . rights or obligations . . . under State law" and does not involve "only the rights or obligations" of parties listed in the proviso.

WRENN *v.* BENSON ET AL.

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 88–6494. Decided April 17, 1989*

Since October Term 1986, *pro se* petitioner has filed 22 petitions for certiorari with this Court and has been denied leave to proceed *in forma pauperis* 19 times, most recently in *Wrenn* v. *Benson* and *Wrenn* v. *Ohio Dept. of Mental Health,* 489 U. S. 1095. The supporting affidavits of indigency filed with his last nine petitions for certiorari indicate that his financial condition has remained substantially unchanged.

Held: The Clerk of the Court is directed not to accept further filings from petitioner in which he seeks leave to proceed *in forma pauperis* unless the affidavit submitted with the filing indicates that his financial condition has substantially changed from that reflected in the affidavits he submitted in *Wrenn* v. *Benson* and *Wrenn* v. *Ohio Dept. of Mental Health, supra.* Justice is not served if the Court continues to process his requests when his financial condition has not changed from that reflected in a previous filing for which he was denied leave to proceed *in forma pauperis.* See *In re McDonald,* 489 U. S. 180.

Order entered.

PER CURIAM.

On March 27, 1989, we denied *pro se* petitioner Curtis Wrenn's request to proceed *in forma pauperis* under this Court's Rule 46.1 in filing petitions for certiorari in *Wrenn* v. *Benson* and *Wrenn* v. *Ohio Dept. of Mental Health,* 489 U. S. 1095. Since October Term 1986, petitioner has filed 22 petitions for certiorari with the Court. We denied him leave to proceed *in forma pauperis* with respect to 19 of those petitions, and he paid the docketing fee required by this Court's Rule 45(a) on one occasion.[1] He also filed one petition for rehearing.[2]

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*Together with No. 88–6497, *Wrenn* v. *Department of Mental Health of Ohio,* also on motion for leave to proceed *in forma pauperis.*

[1] See *Wrenn* v. *Benson* and *Wrenn* v. *Ohio Dept. of Mental Health,* 489 U. S. 1095 (1989) (IFP status denied); *Wrenn* v. *New York City Health &*

[Footnote 2 is on p. 90]

This Court's Rule 46.1 requires that "[a] party desiring to proceed in this Court *in forma pauperis* shall file a motion for leave to so proceed, together with his affidavit in the form prescribed in Fed. Rules App. Proc., Form 4 . . . setting forth with particularity facts showing that he comes within the statutory requirements." Our decision to deny a petitioner leave to proceed *in forma pauperis* is based on our review of the information contained in the supporting affidavit of indigency.[3] In petitioner's case, a review of the affi-

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Hospitals Corporation and *Wrenn* v. *United States District Court*, 489 U. S. 1008 (1989) (same); *Wrenn* v. *Thornburgh*, 488 U. S. 1039 (1989) (same); *Wrenn* v. *Bowen*, 488 U. S. 1028 (1989) (same); *Wrenn* v. *Commissioner*, 486 U. S. 1041 (1988) (same); *Wrenn* v. *Gould*, 484 U. S. 1067 (1988) (same; paid docketing fee required by this Court's Rule 45(a) and submitted petition in compliance with Rule 33); *Wrenn* v. *Gould*, 484 U. S. 961 (1987) (IFP status denied); *Wrenn* v. *Board of Directors, Whitney M. Young, Jr., Health Center, Inc.*, and *Wrenn* v. *Bowen*, 484 U. S. 894 (1987) (same); *Wrenn* v. *Capstone Medical Center*, 483 U. S. 1003 (1987) (same); *Wrenn* v. *Weinberger*, 481 U. S. 1047 (1987) (same); *Wrenn* v. *Christian Hospital NE–NW*, 479 U. S. 1081 (1987) (same); *Wrenn* v. *McFadden*, 479 U. S. 1028 (1987) (same); *Wrenn* v. *Ohio Dept. of Mental Health*, 479 U. S. 1016 (1986) (same); *Wrenn* v. *Ohio Dept. of Mental Health*, 479 U. S. 981 (1986) (same); *Wrenn* v. *Missouri*, 479 U. S. 981 (1986) (same); *Wrenn* v. *Ohio Dept. of Mental Health*, 479 U. S. 928 (1986) (same); *Wrenn* v. *Ohio Dept. of Mental Health*, 479 U. S. 809 (1986) (same); *Wrenn* v. *St. Charles Hospital*, 477 U. S. 907 (1986); *Wrenn* v. *Walters*, 475 U. S. 1128 (1986).

[2] *Wrenn* v. *Gould*, 485 U. S. 1015 (1988).

[3] The Clerk of the Court provides the following Form 4 affidavit to those who seek assistance in drafting *in forma pauperis* papers:

"I, [John Doe], being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

"I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

"1. Are you presently employed?

[Footnote 3 is continued on p. 91]

davits he has filed with his last nine petitions for certiorari indicates that his financial condition has remained substantially unchanged.[4] The Court denied him leave to proceed *in forma pauperis* with respect to each petition. Petitioner has nonetheless continued to file for leave to proceed *in forma pauperis*.

"a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

"b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received.

"2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources?

"a. If the answer is yes, describe each source of income and state the amount received from each during the last twelve months.

"3. Do you own any cash or checking or savings account?

"a. If the answer is yes, state the total value of the items owned.

"4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

"a. If the answer is yes, describe the property and state its approximate value.

"5. List the persons who are dependent upon you for support and state your relationship to those persons.

"I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury."

[4] See *Wrenn* v. *Benson* and *Wrenn* v. *Ohio Dept. of Mental Health*, 489 U. S. 1095 (1989) ($2,309.67 per month in salary; $46 in cash; $72,000 home; $250 savings bond; 4 dependents); *Wrenn* v. *United States District Court* and *Wrenn* v. *New York City Health & Hospitals Corporation*, 489 U. S. 1008 (1989) ($1,390.20 per month in salary; $72 in cash; $72,000 home; $250 savings bond; 4 dependents); *Wrenn* v. *Thornburgh*, 488 U. S. 1039 (1989) ($1,390.20 per month in salary; $72 in cash; $72,000 home; $250 savings bond; 4 dependents); *Wrenn* v. *Bowen*, 488 U. S. 1028 (1989) ($2,309.67 per month in salary; $46 in cash; $72,000 home; $250 savings bond; 4 dependents); *Wrenn* v. *Commissioner*, 486 U. S. 1041 (1988) ($1,073 per month in salary; $14,496 per year in retirement benefits; $42 in cash; $72,000 home; 4 dependents); *Wrenn* v. *Gould*, 484 U. S. 961 (1987) ($1,073 per month in salary; $8,400 per year in retirement benefits; $61 in cash; $72,000 home; 4 dependents); *Wrenn* v. *Bowen*, 484 U. S. 894 (1987) ($1,073 per month in salary; $8,400 per year in retirement benefits; $61 in cash; $72,000 home; 4 dependents).

In *In re McDonald*, 489 U. S. 180, 184 (1989), we said: "Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice." We do not think that justice is served if the Court continues to process petitioner's requests to proceed *in forma pauperis* when his financial condition has not changed from that reflected in a previous filing in which he was denied leave to proceed *in forma pauperis*.

We direct the Clerk of the Court not to accept any further filings from petitioner in which he seeks leave to proceed *in forma pauperis* under this Court's Rule 46.1, unless the affidavit submitted with the filing indicates that petitioner's financial condition has substantially changed from that reflected in the affidavits submitted by him in *Wrenn* v. *Benson* and *Wrenn* v. *Ohio Dept. of Mental Health*, 489 U. S. 1095 (1989).

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I dissent from this order for the reasons stated in *In re McDonald*, 489 U. S. 180, 185 (BRENNAN, J., dissenting), and in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983) (BRENNAN, J., dissenting).

JUSTICE STEVENS, dissenting.

Because I believe the preparation and enforcement of orders of this kind consume more of the Court's valuable time than is consumed by the routine denial of frivolous motions and petitions, see *In re McDonald*, 489 U. S. 180, 185 (1989) (BRENNAN, J., dissenting); *Brown* v. *Herald Co.*, 464 U. S. 928 (1983) (BRENNAN, J., dissenting); *id.*, at 931 (STEVENS, J., dissenting), I respectfully dissent.

CALIFORNIA ET AL. *v.* ARC AMERICA CORP. ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-1862. Argued February 27, 1989—Decided April 18, 1989

Illinois Brick Co. v. *Illinois,* 431 U. S. 720, held that, generally, only overcharged direct purchasers, and not subsequent indirect purchasers, are entitled to recover treble damages under § 4 of the Clayton Act for price fixing violative of § 1 of the Sherman Act. Appellant States—who are, at least in part, indirect purchasers of cement—brought class actions against various cement producers in the appropriate federal courts seeking treble damages under the federal antitrust laws for an alleged nationwide conspiracy to fix cement prices and damages for alleged violations of their respective state antitrust laws, which arguably allow indirect purchasers to recover for all overcharges passed on to them by direct purchasers. The cases were transferred to the District Court in Arizona for coordinated pretrial proceedings, and a settlement was reached with several major defendants. When appellants sought payment out of the settlement fund for their state indirect purchaser claims, appellees, class members who are direct purchasers, objected. The court refused to allow the claims, ruling that the state statutes are pre-empted by federal law because they are clear attempts to frustrate Congress' purposes and objectives, as interpreted in *Illinois Brick.* The Court of Appeals affirmed, holding that, depending on how they were construed, the state statutes would either conflict directly with federal law under *Illinois Brick* or would impermissibly interfere with the three federal antitrust policy goals that the court identified as having been defined by *Illinois Brick* and *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481: avoiding unnecessarily complicated litigation; providing direct purchasers with incentives to bring private antitrust actions; and avoiding multiple liability of defendants.

Held: The rule limiting federal antitrust recoveries to direct purchasers does not prevent indirect purchasers from recovering damages flowing from state antitrust law violations. Pp. 100–106.

(a) The state indirect purchaser statutes are not pre-empted by the federal antitrust laws. There is no claim of express pre-emption or of congressional occupation of the field. The claim that the state laws are inconsistent with, and stand as an obstacle to, effectuating the congressional purposes identified in *Hanover Shoe* and *Illinois Brick* misunderstands these cases, which merely construed the federal antitrust laws and did not consider state-law or pre-emption standards or define the interrelationship between the federal and state law. Nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws. Pp. 100–103.

(b) In any event, the state indirect purchaser statutes do not interfere with accomplishing the federal-law purposes as identified in *Illinois Brick*. First, the state statutes will not engender unnecessarily complicated federal antitrust proceedings, since they cannot and do not purport to affect available federal-law remedies; since claims under them could be brought in state court, separately from federal direct purchaser actions; and since federal courts have discretion to decline to exercise pendent jurisdiction over burdensome state claims. Second, claims under the state statutes will not reduce the incentives of direct purchasers to bring private federal antitrust actions by reducing their potential recoveries. *Illinois Brick* was not concerned with the risk that a federal plaintiff might not be able to recover its entire damages award or might be offered less to settle. Rather, it was concerned that requiring direct and indirect purchasers to apportion the recovery under a single statute—§ 4 of the Clayton Act—would result in no one plaintiff having a sufficient incentive to sue under that statute. The state statutes at issue pose no similar risk. That direct purchasers' recoveries may be reduced because they will have to share the settlement fund with indirect purchasers is not due to the impermissible operation of the state statutes but is, rather, a function of the fact and form of the settlement, which was intended to dispose of all claimants, whether claiming under federal or state law and whether direct or indirect purchasers. Third, claims under the state statutes will not contravene any express federal policy condemning multiple liability for antitrust defendants, since *Illinois Brick* and similar cases simply construed § 4, and did not identify a federal policy against imposing state liability in addition to that imposed by federal law. Pp. 103–106.

817 F. 2d 1435, reversed.

WHITE, J., delivered the opinion of the Court, in which all other Members joined, except STEVENS and O'CONNOR, JJ., who took no part in the consideration or decision of the case.

Thomas Greene, Supervising Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were *John K. Van de Kamp*, Attorney General, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, *Sanford N. Gruskin*, Assistant Attorney General, *Owen Lee*

Kwong, and *H. Chester Horne, Jr.*, Deputy Attorney General, *Don Siegelman*, Attorney General of Alabama, and *James B. Prude*, Assistant Attorney General, *Robert K. Corbin*, Attorney General of Arizona, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Stephen P. Kilgriff*, Deputy Attorney General, and *Kathleen M. Mahoney*, Special Assistant Attorney General.

Roy T. Englert, Jr., argued the cause for the United States as *amicus curiae* urging reversal. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Rule, Deputy Solicitor General Merrill, Deputy Assistant Attorney General Starling, Catherine G. O'Sullivan*, and *Marion L. Jetton.*

Theodore B. Olson argued the cause for appellees. With him on the brief for appellee ARC America Corp. were *Phillip H. Rudolph, John J. Hanson*, and *John J. Waller, Jr. David J. Leonard* and *David H. Nix* filed a brief for appellees Class Members Allied Concrete, Inc., et al.*

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*Briefs of *amici curiae* urging reversal were filed for Thirty-five States et al. by *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Michael F. Brockmeyer*, and *Ellen S. Cooper, Alan M. Barr*, and *Craig J. Hornig*, Assistant Attorneys General, *Grace Berg Schaible*, Attorney General of Alaska, and *Richard D. Monkman, John Steven Clark*, Attorney General of Arkansas, *Duane Woodard*, Attorney General of Colorado, and *Thomas P. McMahon*, First Assistant Attorney General, *Joseph I. Lieberman*, Attorney General of Connecticut, and *Robert M. Langer* and *Steven M. Rutstein*, Assistant Attorneys General, *Charles M. Oberly III*, Attorney General of Delaware, and *David G. Culley*, Deputy Attorney General, *Robert A. Butterworth*, Attorney General of Florida, *Warren Price III*, Attorney General of Hawaii, and *Robert A. Marks, Rod Kimura*, and *Ann Catherine Blank*, Deputy Attorneys General, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, and *Frank A. Baldwin*, Deputy Attorney General, *Thomas J. Miller*, Attorney General of Iowa, and *John R. Perkins*, Deputy Attorney General, *Robert T. Stephan*, Attorney General of Kansas, and *David M. Cooper*, Assistant Attorney General, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, and *Stephen L. Wessler*, Deputy Attorney General, *James M. Shannon*, Attorney General of Massachusetts, and *George Weber*, Assistant Attorney General, *Frank*

JUSTICE WHITE delivered the opinion of the Court.

In *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977), the State of Illinois brought suit on its own behalf and on behalf

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J. Kelley, Attorney General of Michigan, *Michael C. Moore*, Attorney General of Mississippi, and *Robert E. Sanders*, Special Assistant Attorney General, *William L. Webster*, Attorney General of Missouri, and *Tom A. Glassberg*, Assistant Attorney General, *Mike Greely*, Attorney General of Montana, and *Joe Roberts*, Assistant Attorney General, *Robert M. Spire*, Attorney General of Nebraska, and *Dale A. Comer*, Assistant Attorney General, *Stephen E. Merrill*, Attorney General of New Hampshire, and *Terry L. Robertson*, Senior Assistant Attorney General, *W. Cary Edwards*, Attorney General of New Jersey, and *Laurel A. Price*, Deputy Attorney General, *Robert Abrams*, Attorney General of New York, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, and *Doreen C. Johnson*, Assistant Attorney General, *Robert H. Henry*, Attorney General of Oklahoma, and *Jane Wheeler*, Assistant Attorney General, *James E. O'Neil*, Attorney General of Rhode Island, and *Robyn Y. Davis*, Assistant Attorney General, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *W. J. Michael Cody*, Attorney General of Tennessee, and *Perry A. Craft*, Deputy Attorney General, *Jim Mattox*, Attorney General of Texas, *Mary F. Keller*, Executive Assistant Attorney General, and *Allene D. Evans*, Assistant Attorney General, *David L. Wilkinson*, Attorney General of Utah, and *Richard M. Hagstrom*, Assistant Attorney General, *Mary Sue Terry*, Attorney General of Virginia, and *Allen L. Jackson*, Assistant Attorney General, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Carol A. Smith*, Assistant Attorney General, *Charles G. Brown*, Attorney General of West Virginia, *C. William Ullrich*, First Deputy Attorney General, and *Dan Huck*, Deputy Attorney General, *Donald J. Hanaway*, Attorney General of Wisconsin, and *Kevin J. O'Connor*, Assistant Attorney General, and *Joseph B. Meyer*, Attorney General of Wyoming; for the Consumers Union of U. S., Inc., by *Alan Mark Silbergeld;* and for the National Conference of State Legislatures et al. by *Benna Ruth Solomon, David J. Burman*, and *Thomas L. Boeder*.

Briefs of *amici curiae* urging affirmance were filed for the Business Roundtable by *Thomas B. Leary* and *Janet L. McDavid;* for the Chamber of Commerce of the United States by *Bert W. Rein, James M. Johnstone*, and *Stephen A. Bokat;* and for the National Association of Manufacturers by *Otis Pratt Pearsall, Philip H. Curtis, Ronald C. Redcay, Jan S. Amundson*, and *Quentin Riegel*.

Robert K. Corbin, Attorney General, and *Anthony B. Ching*, Solicitor General, filed a brief for the State of Arizona as *amicus curiae*.

of a number of local governmental entities seeking treble damages under § 4 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 15(a),[1] for an alleged conspiracy to fix the price of concrete block in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. The State and the local governments were all indirect purchasers of concrete block—that is, they did not purchase concrete block directly from the price-fixing defendants but rather purchased products or contracted for construction into which the concrete block was incorporated by a prior purchaser. The Court held that, with limited exceptions,[2] only overcharged direct purchasers, and not subsequent indirect purchasers, were persons "injured in [their] business or property" within the meaning of § 4, and that therefore the State of Illinois was not entitled to recover under federal law for the portion of the overcharge passed on to it.

Appellants in the present case, the States of Alabama, Arizona, California, and Minnesota, brought suit in the appropriate federal courts on their own behalf and on behalf of classes of all governmental entities within each State, excluding the Federal Government, seeking treble damages under § 4 of the Clayton Act for an alleged nationwide conspiracy to fix prices of cement in violation of § 1 of the Sherman Act. Appellants are, at least in part, indirect purchasers of cement, and so under *Illinois Brick*, like the State of Illinois in that case, would not be entitled to recover on their indirect purchaser claims under § 4 unless those claims fell within one of the exceptions. In their complaints, however, appellants also alleged violations of their respective state antitrust laws under which, as a matter of state law, indirect purchasers arguably are allowed to recover for all overcharges passed on to them by direct purchasers.[3] The claims under these state indirect purchaser statutes are the focus of this case.

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[1] Section 4 provides as follows:

"[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15(a).

[2] The Court noted two possible exceptions: when the direct purchaser and the indirect purchaser have entered into pre-existing cost-plus contracts, *Illinois Brick Co.* v. *Illinois*, 431 U. S., at 732, n. 12, and when the direct purchaser is owned or controlled by the indirect purchaser, *id.*, at 736, n. 16.

Numerous similar actions were filed by other plaintiffs in various District Courts, and the actions were transferred to the United States District Court for the District of Arizona for coordinated pretrial proceedings. *In re Cement and Concrete Antitrust Litigation,* 437 F. Supp. 750 (JPML 1977). The District Court certified the actions as class actions and established a number of plaintiff classes. Between July 1979 and October 1981, several major defendants settled with the various classes, resulting in a settlement fund in excess of $32 million. The settlements left distribution of the fund for later resolution, subject to approval of the District Court.

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[3] The statutes of Alabama, California, and Minnesota expressly allow indirect purchasers to sue. See Ala. Code § 6–5–60(a) (1975) (allowing recovery by any person "injured or damaged . . . , direct or indirect"); Cal. Bus. & Prof. Code Ann. § 16750(a) (West Supp. 1989) (allowing recovery "regardless of whether such injured person dealt directly or indirectly with the defendant"); Minn. Stat. § 325D.57 (1988) (allowing recovery by any person "injured directly or indirectly"). A number of other jurisdictions have similar statutes. Colo. Rev. Stat. § 6–4–106 (Supp. 1988); D. C. Code § 28–4509(a) (1981); Haw. Rev. Stat. § 480–14(c) (1985); Ill. Rev. Stat., ch. 38, ¶ 60–7(2) (1988); Kan. Stat. Ann. § 50–801(b) (Supp. 1988); Md. Com. Law Code Ann. § 11–209 (1983); Mich. Comp. Laws Ann. § 445.778 (West Supp. 1988); Miss. Code Ann. § 75–21–9 (1972); N. M. Stat. Ann. § 57–1–3(A) (1987); R. I. Gen. Laws § 6–36–12(g) (1985); S. D. Codified Laws § 37–1–33 (1986); Wis. Stat. § 133.18 (1987–1988).

The Arizona statute, Ariz. Rev. Stat. Ann. § 44–1408(A) (1987), generally follows the language of the Clayton Act, but it might be interpreted as a matter of state law as authorizing indirect purchasers to recover. This is appellants' position. See Brief for Appellants 19, n. 6; Juris. Statement 9. Appellees dispute this interpretation, Brief for Appellee ARC America Corp. 21, n. 14, and the District Court and the Court of Appeals did not pass on this question given their holdings that even if the statute was so interpreted it was pre-empted by federal law. We express no opinion on this question of Arizona law.

Appellants sought payment out of the settlement fund for their state indirect purchaser claims. Appellees, class members who are direct purchasers, objected. When the District Court approved a plan for distributing the settlement fund, it refused to allow the claims against the fund pursuant to state indirect purchaser statutes. According to the District Court, "[s]uch statutes are clear attempts to frustrate the purposes and objectives of Congress, as interpreted by the Supreme Court in *Illinois Brick*, and, accordingly, are pre-empted by federal law." App. to Juris. Statement A–31 (emphasis omitted).

The Ninth Circuit affirmed. *In re Cement and Concrete Antitrust Litigation*, 817 F. 2d 1435 (1987). The Court of Appeals identified "three purposes or objectives of federal antitrust law in this context," as defined by *Illinois Brick* and *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968): avoiding unnecessarily complicated litigation; providing direct purchasers with incentives to bring private antitrust actions; and avoiding multiple liability of defendants. 817 F. 2d, at 1445. If state laws permitting indirect purchasers to recover were construed to restrict direct purchasers to suing only for the amount of any overcharge they have absorbed, the Court of Appeals was of the view that state law conflicted directly with federal law as construed in *Illinois Brick*. Alternatively, if state law permitted indirect purchasers to bring claims for damages in addition to the claims brought by direct purchasers, it would "impermissibly interfere with the three policy goals outlined in *Hanover Shoe* and *Illinois Brick*." 817 F. 2d, at 1445. The Court of Appeals therefore held that state indirect purchaser claims that did not satisfy any exception to *Illinois Brick* were pre-empted.

Appellants appealed to this Court, invoking our jurisdiction under 28 U. S. C. § 1254(2). We noted probable jurisdiction, 488 U. S. 814 (1988), and we now reverse.

We should first make it clear exactly what the issue is before us. These cases alleged violations of both the Sherman Act and state antitrust Acts. The settlements, as we understand it, covered both the federal and the state-law claims; the settlement fund was intended to be distributed in complete satisfaction of those claims. Under federal law, no indirect purchaser is entitled to sue for damages for a Sherman Act violation, and there is no claim here that state law could provide a remedy for the federal violation that federal law forbids. Had these cases gone to trial and a Sherman Act violation been proved, only direct purchasers would have been entitled to damages for that violation, and there is no suggestion by the parties that the same rule should not apply to distributing that part of the fund that was meant to settle the Sherman Act claims. The issue before us is whether this rule limiting recoveries under the Sherman Act also prevents indirect purchasers from recovering damages flowing from violations of state law, despite express state statutory provisions giving such purchasers a damages cause of action.

The path to be followed in pre-emption cases is laid out by our cases. It is accepted that Congress has the authority, in exercising its Article I powers, to pre-empt state law. In the absence of an express statement by Congress that state law is pre-empted, there are two other bases for finding pre-emption. First, when Congress intends that federal law occupy a given field, state law in that field is pre-empted. *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 212–213 (1983). Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941). See, *e. g., Silkwood* v. *Kerr-McGee Corp.,* 464 U. S. 238, 248 (1984).

In this case, in addition, appellees must overcome the presumption against finding pre-emption of state law in areas traditionally regulated by the States. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.,* 471 U. S. 707, 716 (1985). When Congress legislates in a field traditionally occupied by the States, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 230 (1947). Given the long history of state common-law and statutory remedies against monopolies and unfair business practices,[4] it is plain that this is an area traditionally regulated by the States. Cf. *Florida Lime & Avocado Growers, supra,* at 146 (regulation to "prevent the deception of consumers").

In light of these principles, the Court of Appeals erred in holding that the state indirect purchaser statutes are pre-empted. There is no claim that the federal antitrust laws expressly pre-empt state laws permitting indirect purchaser recovery.[5] Moreover, appellees concede that Congress has not pre-empted the field of antitrust law. Brief for Appellee

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[4] At the time of the enactment of the Sherman Act, 21 States had already adopted their own antitrust laws. Mosk, State Antitrust Enforcement and Coordination with Federal Enforcement, 21 A. B. A. Antitrust Section 358, 363 (1962). Moreover, the Sherman Act itself, in the words of Senator Sherman, "does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government." 21 Cong. Rec. 2456 (1890).

[5] Cf. National Cooperative Research Act of 1984, 15 U. S. C. § 4303(c) (1982 ed., Supp. V); Export Trading Company Act of 1982, 15 U. S. C. §§ 4016, 4002(a)(7).

ARC America Corp. 10, n. 5; Brief for Appellees Allied Concrete, Inc., et al. 4. Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies. 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman); see *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579, 632–635 (1976) (Stewart, J., dissenting). And on several prior occasions, the Court has recognized that the federal antitrust laws do not pre-empt state law. See *Watson* v. *Buck*, 313 U. S. 387, 403 (1941); *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 259–260 (1937); cf. *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 133–134 (1978).

Appellees' only contention is that state laws permitting indirect purchaser recoveries pose an obstacle to the accomplishment of the purposes and objectives of Congress. State laws to this effect are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct. *Illinois Brick*, 431 U. S., at 746; *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 485–486 (1977). The Court of Appeals concluded, however, that such laws are inconsistent with and stand as an obstacle to effectuating the congressional purposes and policies identified in *Hanover Shoe* and *Illinois Brick*.[6] In this respect, the Court of Appeals has misunderstood both *Hanover Shoe* and *Illinois Brick*.

Neither of those cases addressed the pre-emptive force of the federal antitrust laws. Neither case contains any discussion of state law or of the relevant standards for pre-emption of state law. As we made clear in *Illinois Brick*, the issue before the Court in both that case and in *Hanover Shoe* was strictly a question of statutory interpretation—what was the proper construction of § 4 of the Clayton Act. See, *e. g.*, 431 U. S., at 736.

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[6] In one respect, the Court of Appeals was overly narrow in its description of the congressional purposes identified in *Illinois Brick*. In *Illinois Brick*, the Court was concerned not merely that direct purchasers have sufficient incentive to bring suit under the antitrust laws, as the Court of Appeals asserted, but rather that at least some party have sufficient incentive to bring suit. Indeed, we implicitly recognized as much in noting that indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them. See 431 U. S., at 732, n. 12.

It is one thing to consider the congressional policies identified in *Illinois Brick* and *Hanover Shoe* in defining what sort of recovery federal antitrust law authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do under their own antitrust law. As construed in *Illinois Brick*, § 4 of the Clayton Act authorizes only direct purchasers to recover monopoly overcharges under federal law. We construed § 4 as not authorizing indirect purchasers to recover under federal law because that would be contrary to the purposes of Congress. But nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws.

The Court of Appeals also erred in concluding that state indirect purchaser statutes interfere with accomplishing the purposes of the federal law that were identified in *Illinois Brick*. First, the Court of Appeals concluded that state indirect purchaser statutes interfere with the congressional purpose of avoiding unnecessarily complicated proceedings on federal antitrust claims. But these state statutes cannot and do not purport to affect remedies available under federal law. Furthermore, state indirect purchaser actions will not necessarily be brought in federal court. 817 F. 2d, at 1445. Unlike the federal indirect purchaser claims asserted in *Illinois Brick*, which would have been exclusively within the jurisdiction of the federal courts, 15 U. S. C. §§ 15(a), 26, claims under state indirect purchaser statutes could be brought in state courts, separately from federal actions brought by direct purchasers. Moreover, federal courts have the discretion to decline to exercise pendent jurisdiction over state indirect purchaser claims, even if those claims are brought in the first instance in federal court. See *Mine Workers* v. *Gibbs*, 383 U. S. 715, 725–726 (1966). Since many state indirect purchaser actions would be heard in state courts, at least when the federal courts determined that hearing those claims would be overly burdensome, any complication of federal direct purchaser actions in federal court would be minimal.

Second, the Court of Appeals reasoned that allowing state indirect purchaser claims could reduce the incentives of direct purchasers to bring antitrust actions by reducing their potential recoveries. The presence of indirect purchaser claims would reduce settlement offers to direct purchasers, the Court of Appeals believed, and if the total liability were to exhaust a defendant's assets, the direct purchasers would have to share the defendant's estate in bankruptcy with indirect purchasers. But the Court in *Illinois Brick* was not concerned with the risk that a plaintiff might not be able to recover its entire damages award or might be offered less to settle. Indeed, taken to its extreme, the Court of Appeals' logic would lead to the pre-emption of any state-law claims against antitrust defendants, even if wholly unrelated, because the presence of other litigation could threaten the defendants with bankruptcy and reduce their willingness to settle. *Illinois Brick* was concerned that requiring direct and indirect purchasers to apportion the recovery under a single statute—§ 4 of the Clayton Act—would result in no one plaintiff having a sufficient incentive to sue under that statute. State indirect purchaser statutes pose no similar risk to the enforcement of the federal law.

Appellees argue that because the defendants in these antitrust actions have settled and there is a limited settlement fund, the indirect purchasers' claims are pre-empted because those claims will likely reduce the amount that can be paid from the fund to direct purchasers.[7] But as we said earlier, the settlement covered both federal and state-law claims, and whatever amount is allocable to federal claims will be distributed only to direct purchasers. Indirect purchasers will participate only in distributing the funds available to claimants under state law. Even if the settlement fund is not to be divided between state and federal-law claimants, the settlement necessarily was intended to dispose of all claimants, whether claiming under federal or state law and whether direct or indirect purchasers. That direct purchasers may have to share with indirect purchasers is a function of the fact and form of settlement rather than the impermissible operation of state indirect purchaser statutes.

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[7] Contrary to the Court of Appeals' suggestion, 817 F. 2d, at 1445, there is no contention here that the state indirect purchaser statutes themselves seek to limit the recovery direct purchasers can obtain under federal law.

Third, the Court of Appeals concluded that state indirect purchaser claims might subject antitrust defendants to multiple liability, in contravention of the "express federal policy" condemning multiple liability. 817 F. 2d, at 1446 (citing *Illinois Brick; Associated General Contractors of California, Inc.* v. *Carpenters,* 459 U. S. 519, 544 (1983); and *Blue Shield of Virginia* v. *McCready,* 457 U. S. 465, 474–475 (1982)). But *Illinois Brick,* as well as *Associated General Contractors* and *Blue Shield,* all were cases construing § 4 of the Clayton Act; in none of those cases did the Court identify a federal policy against States imposing liability in addition to that imposed by federal law. Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law, see *Silkwood* v. *Kerr-McGee Corp.,* 464 U. S., at 257–258; *California* v. *Zook,* 336 U. S. 725, 736 (1949), and no clear purpose of Congress indicates that we should decide otherwise in this case.

When viewed properly, *Illinois Brick* was a decision construing the federal antitrust laws, not a decision defining the interrelationship between the federal and state antitrust laws. The congressional purposes on which *Illinois Brick* was based provide no support for a finding that state indirect purchaser statutes are pre-empted by federal law. The judgment of the Court of Appeals is therefore reversed.

So ordered.

JUSTICE STEVENS and JUSTICE O'CONNOR took no part in the consideration or decision of this case.

MASSACHUSETTS *v.* MORASH

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 88–32. Argued February 21, 1989—Decided April 18, 1989

Petitioner Commonwealth issued criminal complaints charging that, in failing to compensate two discharged bank vice presidents for vacation time they accrued but did not use, respondent bank president had violated a Massachusetts statute making it unlawful for an employer not to pay a discharged employee his full wages, including vacation payments, on the date of his discharge. Respondent moved to dismiss on the ground that the bank's vacation policy constituted an "employee welfare benefit plan" under § 3(1) of the Employee Retirement Income Security Act of 1974 (ERISA), and that the prosecution therefore ran afoul of § 514(a) of ERISA, which pre-empts "any and all State laws insofar as they . . . relate to any employee benefit plan." The trial court reported the preemption question to the Massachusetts Appeals Court for decision. For the purpose of answering the reported question, the parties stipulated that the bank had agreed to pay employees in lieu of unused vacation time, and that such payments were made out of general assets in lump sums upon employment termination. The Supreme Judicial Court of Massachusetts transferred the case to its docket on its own initiative and held that the bank's policy constituted an "employee welfare benefit plan" and that the prosecution was therefore pre-empted.

Held: A policy of paying discharged employees for their unused vacation time does not constitute an "employee welfare benefit plan" within the meaning of § 3(1) of ERISA, and a criminal action to enforce that policy is therefore not foreclosed by § 514(a). Pp. 112–121.

(a) Although § 3(1) defines an "employee welfare benefit plan" as "any plan . , . maintained for the purpose of providing . . . vacation benefits," the reference to such benefits—when viewed in the context of the many other, related types of welfare benefits listed in the section and in light of ERISA's primary purposes of preventing the mismanagement of accumulated plan funds and the failure to pay benefits from such funds—must be understood not to relate to ordinary vacation payments, which typically are fixed, due at known times, not dependent on contingencies outside the employee's control, and payable from the employer's general assets; rather, it encompasses only those vacation benefit funds which accumulate over a period of time and in which either the employee's right to a benefit is contingent upon some future occurrence or the employee bears a risk different from his ordinary employment risk. The regulations of the Secretary of Labor, which are entitled to deference as the reasonable interpretations of the official specifically authorized to define ERISA's terms, adopt this understanding of the statute by providing that numerous "payroll practices" are not "employee welfare benefit plans," including the payment of (1) vacation benefits out of an employer's general assets rather than from a trust fund and (2) premium rates for work during special periods such as holidays and weekends, which position the Secretary has consistently followed even when the premium pay is accumulated and carried over to later years. Pp. 112–119.

(b) There is no merit to respondent's argument that the bank's policy did not constitute an exempted "payroll practice" under the Secretary's regulations because employees were allowed at their option to accumulate vacation time and defer payment for such time until termination. Although neither regulation explicitly covers this precise practice, the reasons for treating premium and vacation payments as payroll practices are equally applicable here, and the vacation benefit cannot be transformed into an "employee welfare benefit plan" solely because the employees did not use their vacation days prior to their formal termination. Moreover, except for the fact of deferral, the payments in question are as much a part of regular basic compensation as overtime pay or salary payments made while the employee is on vacation; amount to the same kind of premium pay that is available for holiday or weekend work; and, unlike normal severance pay, are not contingent upon employment termination. Pp. 119–121.

402 Mass. 287, 522 N. E. 2d 409, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

Carl Valvo, Assistant Attorney General of Massachusetts, argued the cause for petitioner. With him on the briefs were *James M. Shannon*, Attorney General, and *Marc C. Laredo* and *Ruth A. Bourquin*, Assistant Attorneys General.

Jason Berger argued the cause for respondent. With him on the brief was *Marcia E. Greenberg*.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried*, *Deputy Solicitor General Ayer*, *Christopher J. Wright*, *George R. Salem*, *Allen H. Feldman*, and *Edward D. Sieger;* for the State of New York et al. by *Robert Abrams*, Attorney General, *O. Peter Sherwood*, Solicitor General, *Lawrence S. Kahn*, Deputy Solicitor General, and *Jane Lauer Barker*, *M. Patricia Smith*, and *Jennifer S.*

JUSTICE STEVENS delivered the opinion of the Court.

This case requires us to determine whether a company's policy of paying its discharged employees for their unused vacation time constitutes an "employee welfare benefit plan" within the meaning of § 3(1) of the Employee Retirement Income Security Act of 1974 (ERISA or Act), 88 Stat. 833, as amended, 29 U. S. C. § 1002(1), and whether a criminal action to enforce that policy is foreclosed by the Act's broad pre-emption provision.

I

In May 1986, petitioner, the Commonwealth of Massachusetts, issued two complaints in the Boston Municipal Court against respondent, Richard N. Morash, president of the Yankee Bank for Finance and Savings (Bank). The complaints charged Morash with criminal violations of the Massachusetts Payment of Wages Statute, Mass. Gen. Laws § 149:148 (1987).[1]

Under the Massachusetts law, an employer is required to pay a discharged employee his full wages, including holiday or vacation payments, on the date of discharge. Similar wage payment statutes have been enacted by 47 other States,[2] the

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Brand, Assistant Attorneys General; and for the American Federation of Labor and Congress of Industrial Organizations by *Robert M. Weinberg*, *Julia Penny Clark*, and *Laurence Gold*.

[1] Massachusetts Gen. Laws § 149:148 (1987) provides, in pertinent part:

"Every person having employees in his service shall pay weekly each such employee the wages earned by him . . . ; and any employee discharged from such employment shall be paid in full on the day of his discharge . . . . The word 'wages' shall include any holiday or vacation payments due an employee under an oral or written agreement."

[2] See Alaska Stat. Ann. §§ 23.05.140 to 23.05.340 (1984 and Supp. 1988); Ariz. Rev. Stat. Ann. §§ 23–350 to 23–361 (1983 and Supp. 1988); Ark. Code Ann. § 11–4–401 (1987); Cal. Lab. Code Ann. § 227.3 (West Supp. 1989); Colo. Rev. Stat. §§ 8–4–101 to 8–4–126 (1986); Conn. Gen. Stat. §§ 31–71a to 31–71i (1987 and Supp. 1988); Del. Code Ann., Tit. 19, §§ 1101 to 1115 (1985); Ga. Code Ann. § 34–7–2 (1988); Haw. Rev. Stat. §§ 388–1 to 388–13 (1988); Idaho Code §§ 45–601 to 45–615 (1977 and Supp. 1988); Ill. Rev. Stat., ch. 48, ¶¶ 39m–1 to 39m–15 (1987); Ind. Code §§ 22–2–9–1 to

District of Columbia,[3] and the United States,[4] and over half of these include vacation pay. The complaints filed in the Boston Municipal Court alleged that respondent had failed to compensate two discharged bank vice presidents for vacation time they accrued but did not use.

Respondent moved to dismiss the criminal complaints on the ground that the Massachusetts statute, insofar as it applied to these complaints, had been pre-empted by ERISA. He argued that the Bank's vacation policy constituted an "employee welfare benefit plan" under the Act, and that the State's prosecution of him for failure to comply with the policy therefore ran afoul of § 514(a) of the Act, 29 U. S. C.

22–2–9–7 (1988); Iowa Code §§ 91A.2 to 91A.13 (1985); Kan. Stat. Ann. §§ 44–313 to 44–327 (1986); Ky. Rev. Stat. Ann. §§ 337.010 to 337.070 (Baldwin 1986); La. Rev. Stat. Ann. § 631 (West 1985 and Supp. 1989); Me. Rev. Stat. Ann., Tit. 26, §§ 621–626 (1988); Md. Ann. Code, Art. 100, § 94 (1985); Mich. Comp. Laws §§ 408.471 to 408.475 (1985); Minn. Stat. § 181.74 (1988); Miss. Code Ann. §§ 71–1–35 to 71–1–53 (1972 and Supp. 1988); Mo. Rev. Stat. §§ 290.080 to 290.110 (1986); Mont. Code Ann. §§ 39–3–201 to 39–3–215 (1987); Neb. Rev. Stat. § 48–1228 to 48–1232 (1988); Nev. Rev. Stat. §§ 608.005 to 608.060 (1987); N. H. Rev. Stat. Ann. §§ 275:42 to 275:55 (1987); N. J. Stat. Ann. §§ 34:11–4.1 to 34:11–4.11 (West 1988); N. M. Stat. Ann. §§ 50–4–1 to 50–4–12 (1988); N. Y. Lab. Law §§ 190 to 198–c (McKinney 1986 and Supp. 1989); N. C. Gen. Stat. §§ 95–25.2 to 95–25.25 (1985); N. D. Cent. Code §§ 34–14–01 to 34–14–13 (1987); Ohio Rev. Code Ann. § 4113.15 (1980); Okla. Stat., Tit. 40, §§ 165.1 to 165.9 (1986); Ore. Rev. Stat. §§ 652.110 to 652.405 (1987); Pa. Stat. Ann., Tit. 43, §§ 260.2a to 260.11a (Purdon Supp. 1988); R. I. Gen. Laws §§ 28–14–1 to 28–14–30 (1986); S. C. Code §§ 41–10–10 to 41–10–110 (Supp. 1988); S. D. Codified Laws §§ 60–11–9 to 60–11–15 (1978); Tenn. Code Ann. § 50–2–103 (1983); Tex. Rev. Civ. Stat. Ann., Art. 5155 to 5159 (Vernon 1987); Utah Code Ann. §§ 34–28–2 to 34–28–14 (1988); Vt. Stat. Ann., Tit. 21, §§ 341–345 (1987); Va. Code § 40.1–29 (1986); Wash. Rev. Code §§ 49.48.010, 49.48.020 (1987); W. Va. Code §§ 21–5–1, 21–5–4 (1985 and Supp. 1988); Wis. Stat. §§ 109.01 to 109.11 (1987–1988); Wyo. Stat. §§ 27–4–101 to 27–4–105 (1987).

[3] See D. C. Code §§ 36–101 to 36–110 (1981).

[4] See, *e. g.*, 46 U. S. C. § 596. See also *Griffin* v. *Oceanic Contractors, Inc.*, 458 U. S. 564, 572 (1982).

§ 1144(a), which pre-empts "any and all State laws insofar as they . . . relate to any employee benefit plan."[5] Without ruling on the motion, the trial judge reported the preemption question to the Massachusetts Appeals Court for decision; the Supreme Judicial Court then transferred the case to its docket on its own initiative. For the purpose of answering the reported question, the parties stipulated that the Bank had made oral or written agreements stemming from handbooks, manuals, memoranda, and practices to pay employees in lieu of unused vacation time, and that "such payments are made out of the Bank's general assets" in lump sums upon termination of employment.

The Supreme Judicial Court held that the policy constituted an employee welfare benefit plan and that the prosecution was pre-empted by ERISA. 402 Mass. 287, 522 N. E. 2d 409 (1988). The court found that under the plain language of the statute and its earlier decision in *Barry* v. *Dymo Graphic Systems, Inc.*, 394 Mass. 830, 478 N. E. 2d 707 (1985), the Bank's policy constituted a plan, fund, or program for the purpose of providing its participants vacation benefits. It rejected the Commonwealth's argument that a regulation promulgated by the Secretary of Labor (Secretary),[6]

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[5] Section 514 of ERISA, as codified, provides, in pertinent part:

"(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .

"(b) . . .

. . . . .

"(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State."

[6] The Secretary's payroll practice regulation provides, in part:

"(b) *Payroll practices.* For purposes of Title I of the Act and this chapter, the terms 'employee welfare benefit plan' and 'welfare plan' shall not include—

. . . . .

"(3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically had excepted payments out of an employer's general assets for unused vacation time from the definition of a welfare plan because even if regular vacation pay was not included in ERISA, the lump-sum payment for unused vacation time upon discharge was akin to severance pay covered by ERISA. The fact that it would be necessary for an employer to maintain records relating to its employees' unused vacation time, plus the need to accumulate funds to pay the benefits, made it appropriate to treat the employer's promise to its employees as a "plan." The court concluded that the Massachusetts statute related to the plan within the meaning of § 514, and was not excluded from its coverage by the provision saving from pre-emption a "generally applicable criminal law." ERISA § 514(b)(4), 29 U. S. C. § 1144(b)(4).

Because the federal question decided by the Supreme Judicial Court is an important one over which the courts have disagreed,[7] we granted certiorari, 488 U. S. 815 (1988). We now reverse.

II

ERISA was passed by Congress in 1974 to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits. *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1, 15

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and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example—

"(i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons." 29 CFR § 2510.3-1(b)(3) (1987).

[7] Compare *Holland* v. *National Steel Corp.*, 791 F. 2d 1132 (CA4 1986); *Blakeman* v. *Mead Containers*, 779 F. 2d 1146 (CA6 1985) (both holding that vacation benefits constitute employee welfare benefit plan), with *Shea* v. *Wells Fargo Armored Service Corp.*, 810 F. 2d 372 (CA2 1987); *California Hospital Assn.* v. *Henning*, 770 F. 2d 856 (1985), modified, 783 F. 2d 946 (CA9), cert. denied, 477 U. S. 904 (1986); *Golden Bear Family Restaurants, Inc.* v. *Murray*, 144 Ill. App. 3d 616, 494 N. E. 2d 581 (1986) (all holding that vacation pay from employer's general assets not covered by ERISA).

(1987). The "comprehensive and reticulated statute," *Nachman Corp.* v. *Pension Benefit Guaranty Corporation,* 446 U. S. 359, 361 (1980), contains elaborate provisions for the regulation of employee benefit plans. It sets forth reporting and disclosure obligations for plans, imposes a fiduciary standard of care for plan administrators, and establishes schedules for the vesting and accrual of pension benefits. *Metropolitan Life Ins. Co.* v. *Massachusetts,* 471 U. S. 724, 732 (1985). Suits to enforce the terms of the statute and to recover welfare benefits wrongfully withheld arise under federal law and can be brought in federal court without regard for the amount in controversy. See *Firestone Tire & Rubber Co.* v. *Bruch,* 489 U. S. 101, 108 (1989).

The precise coverage of ERISA is not clearly set forth in the Act. ERISA covers "employee benefit plans," which it defines as plans that are either "an employee welfare benefit plan," or "an employee pension benefit plan," or both. ERISA § 3(3), 29 U. S. C. § 1002(3). An employee welfare benefit plan, in turn, is defined as:

> "[A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions)." ERISA § 3(1), as codified, 29 U. S. C. § 1002(1).[8]

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[8] The benefits described "in section 186(c) of this title" include "pooled vacation, holiday, severance or similar benefits." See 29 U. S. C. § 186(c)(6).

The Act does not further define "plan, fund, or program" or "vacation benefits" and does not specify whether every policy to provide vacation benefits falls within its ambit.

The words "any plan, fund, or program . . . maintained for the purpose of providing . . . vacation benefits" may surely be read to encompass any form of regular vacation payments to an employee. A multiemployer fund created to provide vacation benefits for union members who typically work for several employers during the course of a year, see, *e. g.*, *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 4, n. 2 (1983), undoubtedly falls within the scope of the Act. In addition, the creation of a separate fund to pay employees vacation benefits would subject a single employer to the regulatory provisions of ERISA. See *California Hospital Assn.* v. *Henning*, 770 F. 2d 856, 861 (1985), modified, 783 F. 2d 946 (CA9), cert. denied, 477 U. S. 904 (1986).[9] We do not believe, however, that the policy here to pay employees for unused vacation time constitutes an employee welfare benefit plan.

The interpretation of § 3(1) is governed by the familiar principles that "'words grouped in a list should be given related meaning,'" *Schreiber* v. *Burlington Northern, Inc.*, 472 U. S. 1, 8 (1985) (quoting *Securities Industry Assn.* v. *Board of Governors, FRS*, 468 U. S. 207, 218 (1984)), and that "in expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 51 (1987). In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds. *California Hospital Assn.*, *supra*, at 859.[10] To that end, it established extensive reporting, disclosure, and fiduciary duty requirements to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator. Because ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside the employee's control, they present none of the risks that ERISA is intended to address. If there is a danger of defeated expectations, it is no different from the danger of defeated expectations of wages for services performed—a danger Congress chose not to regulate in ERISA.

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[9] Respondent argues that because a pooled vacation benefit plan is "a benefit described in section 186(c) of this title" and thus constitutes an employee welfare benefit plan under 29 U. S. C. § 1002(1)(B), the exclusion of ordinary vacation pay plans from ERISA coverage would render the reference to vacation pay in clause (A) surplusage. Clause (A), however, also includes within ERISA vacation wages paid from a separate fund rather than from general assets. See United States Dept. of Labor, ERISA Opinion Letter No. 77–84A (Nov. 7, 1977). The fact that a benefit covered by clause (B) is also covered by clause (A) is not dispositive of the meaning of clause (A). As the Court of Appeals for the Ninth Circuit noted: "Many of the benefits incorporated in section 1002(1) by the cross-reference to section 186(c) are already found in section 1002(1). Thus it is evident that Congress was not concerned with duplication, but only with assuring that all benefits covered by section 186(c) were also covered by section 1002(1)." *California Hospital Assn.* v. *Henning*, 770 F. 2d 856, 861 (1985), modified, 783 F. 2d 946, cert. denied, 477 U. S. 904 (1986).

This conclusion is supported by viewing the reference to vacation benefits not in isolation but in light of the words that accompany it and give the provision meaning. Section 3(1) subjects to ERISA regulation plans to provide medical, sickness, accident, disability, and death benefits, training programs, day care centers, scholarship funds, and legal services. The distinguishing feature of most of these benefits is that they accumulate over a period of time and are payable only upon the occurrence of a contingency outside of the control of the employee. See 40 Fed. Reg. 24642 (1975). Thus, for example, plans to pay employees severance benefits, which are payable *only* upon termination of employment, are employee welfare benefit plans within the meaning of the Act. See *Holland* v. *Burlington Industries, Inc.*, 772 F. 2d 1140 (CA4 1985), summarily aff'd *sub nom. Brooks* v. *Burlington Industries, Inc.*, 477 U. S. 901 (1986); *Gilbert* v. *Burlington Industries, Inc.*, 765 F. 2d 320 (CA2 1985), summarily aff'd *sub nom. Roberts* v. *Burlington Industries, Inc.*, 477 U. S. 901 (1986). The reference to vacation payments in §3(1) should be understood to include within the scope of ERISA those vacation benefit funds, analogous to other welfare benefits, in which either the employee's right to a benefit is contingent upon some future occurrence or the employee bears a risk different from his ordinary employment risk. It is unlikely that Congress intended to subject to ERISA's reporting and disclosure requirements those vacation benefits which by their nature are payable on a regular basis from the general assets of the employer and are accumulated over time only at the election of the employee.

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[10] See *e. g.*, Private Welfare and Pension Plan Legislation: Hearings on H. R. 1045 et al. before the General Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st and 2d Sess., 470–472 (1970) (testimony of Secretary of Labor concerning mismanagement of 22 pension and welfare funds); 120 Cong. Rec. 4279–4280 (1974) (remarks of Rep. Brademas); *id.*, at 4277–4278 (remarks of Rep. Perkins); 119 Cong. Rec. 30003 (1973) (remarks of Sen. Williams).

The Secretary, who is specifically authorized to define ERISA's "accounting, technical, and trade terms," ERISA §505, 29 U. S. C. §1135,[11] and to whose reasonable views we give deference, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984); *Watt* v. *Alaska*, 451 U. S. 259, 272–273 (1981); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965), has also so understood the statute. In a Notice of Proposed Rulemaking published shortly after the effective date of the Act, the Secretary identified a basic distinction between the benefit programs covered by the Act and the types of regular compensation, including vacation pay, that are not covered:

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[11] Section 505, 88 Stat. 894, provides, in part:

"Subject to title III and section 109, the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this title. Among other things, such regulations may define accounting, technical, and trade terms used in such provisions . . . ."

> "The Secretary also anticipates issuance of regulations that will make it clear that other programs, including certain employer practices (whether pursuant to a collective bargaining agreement or not) under which employees are paid as a part of their regular compensation directly by the employer and under which no separate fund is established will not subject the employer to any filing or disclosure duties under Title I of the Act. Examples of the employer practices that may receive this treatment are payment of overtime pay, *vacation pay*, shift premiums, Sunday premiums, holiday premiums, jury duty or military duty, make-up pay, and pay while absent on account of illness or excused absences." 39 Fed. Reg. 42236 (1974) (emphasis added).

The Secretary subsequently proposed regulations excluding payment of compensation for work performed at night or during holidays and paid sick leave and vacation leave from the definition of an employee benefit. 40 Fed. Reg. 24642–24643 (1975). He explained:

> "[P]aid vacations . . . are not treated as employee benefit plans because they are associated with regular wages or salary, rather than benefits triggered by contingencies such as hospitalization. Moreover, the abuses which created the impetus for the reforms in Title I were not in this area, and there is no indication that Congress intended to subject these practices to Title I coverage." *Ibid.*

The proposed regulations promulgated by the Secretary were adopted without significant modification. They provide that numerous "payroll practices," including the payment of vacation benefits "out of [an] employer's general assets" rather than from a trust fund, are not employee welfare benefit plans within the meaning of ERISA.[12] In addition, under the regulations, the term "employee welfare benefit plan" does not include the payment by an employer of premium rates for work performed during special periods such as holidays and weekends.[13] The Secretary has consistently adhered to this position even when the premium pay is accumulated and carried over to later years.[14]

A contrary interpretation, including routine vacation pay policies within ERISA, would have profound consequences. Most employers in the United States provide some type of vacation benefit to their employees.[15] ERISA coverage would put all these employers to the choice of complying with the statute's detailed requirements for reporting and disclosure or discontinuing the practice of compensating employees for unused vacation time. In addition, the extension of ERISA to claims for vacation benefits would vastly expand the jurisdiction of the federal courts, providing a federal forum for any employee with a vacation grievance.[16] Finally, such an interpretation would also displace the extensive state regulation of the vesting, funding, and participation rights of vacation benefits; because ERISA's vesting and funding requirements do not apply to welfare benefit plans, ERISA §§ 201(1), 301(a), as amended, 29 U. S. C. §§ 1051(1), 1081(a), employees would actually receive less protection if ERISA were applied to ordinary vacation wages paid from the employer's general assets. See Note, 87 Colum. L. Rev. 1702, 1718 (1987).[17] The States have traditionally regulated the payment of wages, including vacation pay. Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with "the separate spheres of governmental authority preserved in our federalist system." *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S., at 19.

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[12] See n. 6, *supra.*

[13] The Secretary's regulation provides, in part:

"(b)(1) Payment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances, such as—

"(i) Overtime pay,

"(ii) Shift premiums,

"(iii) Holiday premiums,

"(iv) Weekend premiums." 29 CFR § 2510.3–1(b)(1) (1987).

[14] See United States Dept. of Labor, ERISA Opinion Letter No. 79–48A (July 30, 1979) (sick leave).

[15] A 1988 survey reflects that paid vacations are provided to 98 percent of the 31,000,000 employees in medium and large establishments. United States Dept. of Labor, Bureau of Labor Statistics, BLS Reports on Employee Benefits in Medium and Large Firms in 1988, pp. 1, 4 (Apr. 4, 1989) (press release). Another survey of 833 companies in manufacturing and nonmanufacturing industries found that 86 percent of them provided payments for, or in lieu of, vacations. United States Chamber of Commerce, Employee Benefits 1986, p. 21 (1987).

III

Respondent argues that, even if the Department of Labor regulation exempting vacation payments from ERISA constitutes a reasonable construction of the Act, the Bank's policy did not constitute a payroll practice under the regulation because employees were allowed at their option to accumulate vacation time and defer payment for such time until termination. See Brief for Respondent 11. We do not agree. Although neither of the Secretary's regulations explicitly covers the precise practice at issue in this case, the reasons for treating holiday and weekend premiums and payments of compensation while an employee is on vacation as "payroll practices" are equally applicable to the payment of an employee's regular wages for accrued and unused vacation time upon discharge. If the employees in this case had chosen to take a vacation, the vacation days would have been available and the vacation benefit would have been excluded under the regulation; the benefit cannot be transformed into an employee welfare benefit plan under ERISA solely because the employees did not use their vacation days prior to their formal termination of employment. See *Shea* v. *Wells Fargo Armored Service Corp.*, 810 F. 2d 372, 377 (CA2 1987).

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[16] A 1983 survey found that state agencies each year resolve more than 19,000 vacation pay claims, involving more than $7.5 million. Note, 16 Loyola U. Chi. L. J. 387, 422 (1985).

[17] Many States have provisions for the vesting of vacation benefits, see Note, 87 Colum. L. Rev. 1702, 1714 (1987), and for the administrative resolution of vacation pay claims, Note, 16 Loyola U. Chi. L. J., at 421–422. An interpretation of ERISA to include ordinary vacation pay would imperil these mechanisms designed for the benefit of employees.

Moreover, except for the fact that the payment has been deferred, such payments are as much a part of the employees' regular basic compensation as overtime pay or the payment of salary while the employee is absent on vacation. If in the end the employee elects to receive additional compensation instead of a paid vacation, he or she is receiving the same kind of premium pay that is available for holiday or weekend work. The fact that the payments in this case were due at the time of the employee's termination does not affect their character as a part of regular compensation. Unlike normal severance pay, the employees' right to compensation for accrued vacation time is not contingent upon the termination of their employment.

In reaching this conclusion, we emphasize that the case before us—and the Secretary's regulations on which we rely—concern payments by a single employer out of its general assets. An entirely different situation would be presented if a separate fund had been created by a group of employers to guarantee the payment of vacation benefits to laborers who regularly shift their jobs from one employer to another. Employees who are beneficiaries of such a trust face far different risks and have far greater need for the reporting and disclosure requirements that the federal law imposes than those whose vacation benefits come from the same fund from which they receive their paychecks. It is sufficient for this case that the Secretary's determination that a single employer's administration of a vacation pay policy from its general assets does not possess the characteristics of a welfare benefit plan constitutes a reasonable construction of the statute.[18]

The judgment of the Massachusetts Supreme Judicial Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[18] We therefore have no occasion to address the Commonwealth's alternative argument that Mass. Gen. Laws § 149:148 (1987) is a "generally applicable criminal law of a State" within the meaning of ERISA § 514(b)(4), 29 U. S. C. § 1144(b)(4).

CHAN ET AL. *v.* KOREAN AIR LINES, LTD.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1055. Argued December 7, 1988—Decided April 18, 1989

This case involves wrongful-death actions against Korean Air Lines, Ltd. (KAL), by survivors of persons killed when one of its planes was destroyed by a Soviet aircraft. All parties agree that their rights are governed by the multilateral treaty known as the Warsaw Convention, which provides a per passenger damages limitation for personal injury or death. A private accord among airlines known as the Montreal Agreement requires carriers to give notice of this limitation to passengers in print size no smaller than 10-point type. Since KAL's notice to passengers on the flight in question appeared in only 8-point type, plaintiffs moved for a partial summary judgment declaring that the discrepancy deprived KAL of the benefit of the damages limitation. The District Court denied the motion, finding that neither the Convention nor the Agreement prescribes elimination of the limitation as the sanction for failure to provide the required form of notice. The Court of Appeals affirmed on interlocutory appeal.

Held: International air carriers do not lose the benefit of the Warsaw Convention's damages limitation if they fail to provide notice of that limitation in passenger tickets. The Montreal Agreement concededly does not impose such a sanction, and the Convention's plain language also does not direct that result. Interpreting the second sentence of Article 3(2) of the Convention—which subjects a carrier to unlimited liability only for the nondelivery of a passenger ticket—to apply to the failure to provide an "adequate" statement of notice of the damages limitation conflicts with the language of the first sentence of Article 3(2), which specifies that "[t]he . . . irregularity . . . of the . . . ticket shall not affect the existence or the validity of the [transportation] contract." Such an interpretation of the text would also entail the unlikely result that even a minor defect in a ticket, totally unrelated to adequate notice, would eliminate the liability limitation. That defective compliance with the notice provision does not void the damages limitation is confirmed by comparing Article 3(2) with other Convention provisions, which specifically impose that sanction for failure to include the notice of liability limitation in baggage checks and air waybills for cargo. Although the Convention's drafting history might be consulted to elucidate a text that is ambiguous, this Court has no power to insert an amendment into a treaty where the text is clear. Pp. 125–135.

265 U. S. App. D. C. 39, 829 F. 2d 1171, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and KENNEDY, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 136.

Milton G. Sincoff argued the cause for petitioners. With him on the brief were *Steven R. Pounian* and *Donald W. Madole.*

Richard J. Lazarus argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried, Assistant Attorney General Bolton,* and *Deputy Solicitor General Ayer.*

George N. Tompkins, Jr., argued the cause and filed a brief for respondent.

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether international air carriers lose the benefit of the limitation on damages for passenger injury or death provided by the multilateral treaty known as the Warsaw Convention if they fail to provide notice of that limitation in the 10-point type size required by a private accord among carriers, the Montreal Agreement.

I

On September 1, 1983, over the Sea of Japan, a military aircraft of the Soviet Union destroyed a Korean Air Lines, Ltd. (KAL), Boeing 747 en route from Kennedy Airport in New York to Seoul, South Korea. All 269 persons on board the plane perished. Survivors of the victims filed wrongful-death actions against KAL in several Federal District Courts, all of which were transferred for pretrial proceedings to the District Court for the District of Columbia pursuant to 28 U. S. C. § 1407. All parties agree that their rights are governed by the Warsaw Convention, a multilateral treaty governing the international carriage of passengers, baggage, and cargo by air. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T. S. No. 876 (1934), reprinted in note following 49 U. S. C. App. § 1502.

The present controversy centers on the per passenger damages limitation for personal injury or death. This was fixed at approximately $8,300 by the Convention, but was raised to $75,000 by the Montreal Agreement, an agreement among carriers executed (and approved by the Civil Aeronautics Board (CAB)) in 1966, and joined by KAL in 1969. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, note following 49 U. S. C. App. § 1502 (approved by CAB Order E–23680, May 13, 1966, 31 Fed. Reg. 7302). In addition to providing for a higher damages limitation, this agreement required carriers to give passengers written notice of the Convention's damage limitations in print size no smaller than 10-point type. The notice of the Convention's liability rules printed on KAL's passenger tickets for the flight in question here appeared in only 8-point type. By motion for partial summary judgment, plaintiffs sought a declaration that this discrepancy deprived KAL of the benefit of the damages limitation.

On July 25, 1985, the District Court for the District of Columbia denied the motion, finding that neither the Warsaw Convention nor the Montreal Agreement prescribes that the sanction for failure to provide the required form of notice is the elimination of the damages limitation. *In re Korean Air Lines Disaster of September 1, 1983*, 664 F. Supp. 1463. Its opinion specifically considered and rejected contrary Second Circuit precedent. See *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F. 2d 85, cert. denied *sub nom. Polskie Linie Lotnicze* v. *Robles*, 464 U. S. 845 (1983). On September 24, 1985, the District Court certified for interlocutory appeal under 28 U. S. C. § 1292(b) (1982 ed., Supp.

IV) the question whether KAL "is entitled to avail itself of the limitation of damages provided by the Warsaw Convention and Montreal Agreement despite its defective tickets." The District of Columbia Circuit allowed the appeal and (following a remand of the record for clarification of the scope of the District Court's order) affirmed, adopting the District Court's opinion in full. *In re Korean Air Lines Disaster of September 1, 1983*, 265 U. S. App. D. C. 39, 829 F. 2d 1171 (1987). We granted certiorari, 485 U. S. 986 (1988), to resolve the conflict among the Courts of Appeals. (In addition to the Second Circuit, the Fifth is in disagreement with the District of Columbia Circuit's resolution here. See *In re Air Crash Disaster Near New Orleans, Louisiana, on July 9, 1982*, 789 F. 2d 1092 (1986), reinstated, 821 F. 2d 1147 (1987) (en banc).)

II

Petitioners concede that by itself the Montreal Agreement imposes no sanction for failure to comply with its 10-point type requirement.[1] They argue, however, that such a re-

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[1] The relevant portion of the Montreal Agreement provides:

"2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention . . . the following notice, which shall be printed in type at least as large as 10 point and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

"ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

"Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name the carrier) and certain other[*] carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on quirement is created by reading the Montreal Agreement in conjunction with the Warsaw Convention. This argument proceeds in two steps. First, petitioners assert that Article 3 of the Warsaw Convention removes the protection of limited liability if a carrier fails to provide adequate notice of the Convention's liability limitation in its passenger tickets. Second, they contend that the Montreal Agreement's 10-point type requirement supplies the standard of adequate notice under Article 3. Because we reject the first point, we need not reach the second.[2]

Article 3 of the Warsaw Convention provides:

> "(1) For the transportation of passengers the carriers must deliver a passenger ticket which shall contain the following particulars:
>
> "*(a)* The place and date of issue;
>
> "*(b)* The place of departure and of destination;

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the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $8,290 or US $16,580.

"The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

"Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

"[*] Either alternative may be used." Aeronautical Statutes and Related Materials 515 (compiled by Office of General Counsel, CAB, 1974).

[2] For a similar reason, we need not discuss Department of Transportation (formerly CAB) Economic Regulation Part 221, 14 CFR § 221.175(a) (1988), which was originally promulgated in 1963, before the Montreal Agreement, and which contains a similar requirement of 10-point type. This imports no sanctions of its own except a civil penalty, see 49 U. S. C. App. § 1471. Thus, even if *(per impossibile)* the Executive Branch could unilaterally prescribe what adequate notice under an international treaty consists of, the sanction of invalidating the damages limitations would still be lacking.

> "*(c)* The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
>
> "*(d)* The name and address of the carrier or carriers;
>
> "*(e)* A statement that the transportation is subject to the rules relating to liability established by this convention.
>
> "(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

Although Article 3(1)*(e)* specifies that a passenger ticket shall contain "[a] statement that the transportation is subject to the rules relating to liability established by this convention," nothing in Article 3 or elsewhere in the Convention imposes a sanction for failure to provide an "adequate" statement. The only sanction in Article 3 appears in the second clause of Article 3(2), which subjects a carrier to unlimited liability if it "accepts a passenger without a passenger ticket having been delivered." Several courts have equated nondelivery of a ticket, for purposes of this provision, with the delivery of a ticket in a form that fails to provide adequate notice of the Warsaw limitation. See *In re Air Crash Disaster Near New Orleans, Louisiana, on July 9, 1982, supra; In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F. 2d 85 (CA2), cert. denied *sub nom. Polskie Linie Lotnicze* v. *Robles*, 464 U. S. 845 (1983); *Deutsche Lufthansa Aktiengesellschaft* v. *CAB*, 156 U. S. App. D. C. 191, 196–197, 479 F. 2d 912, 917–918 (1973); *Lisi* v. *Alitalia-Linee Aeree Italiane, S. p. A.*, 370 F. 2d 508 (CA2 1966), aff'd by equally divided Court, 390 U. S. 455 (1968); *Egan* v. *Kollsman Instrument Corp.*, 21 N. Y. 2d 160, 234 N. E. 2d 199 (1967), cert. denied, 390 U. S. 1039 (1968). See also *Warren* v. *Flying Tiger Line, Inc.*, 352 F. 2d 494 (CA9 1965) (conditioning liability limitation upon delivery of tickets in such manner as to afford passengers a reasonable opportunity to take measures to protect against liability limitation); *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851 (CA2) (same), cert. denied, 382 U. S. 816 (1965). But see *Ludecke* v. *Canadian Pacific Airlines, Ltd.*, 98 D. L. R. 3d 52, 57 (Can. 1979) (rejecting the view of the American cases).

We cannot accept this interpretation. All that the second sentence of Article 3(2) requires in order to avoid its sanction is the "deliver[y]" of "a passenger ticket." Expanding this to mean "a passenger ticket in compliance with the requirements of this Convention" is rendered implausible by the first sentence of Article 3(2), which specifies that "[t]he . . . irregularity . . . of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention." It is clear from this (1) that an "irregularity" does not prevent a document from being a "passenger ticket"; and (2) that an "irregularity" in a passenger ticket does not eliminate the contractual damages limitation provided for by the Convention. "Irregularity" means the "[q]uality or state of not conforming to rule or law," Webster's Second International Dictionary (1950), and in the present context the word must surely refer to the rules established by the Convention, including the notice requirement. Thus, a delivered document does not fail to qualify as a "passenger ticket," and does not cause forfeiture of the damages limitation, merely because it contains a defective notice. When Article 3(2), after making this much clear, continues (in the second sentence) "Nevertheless, if a carrier accepts a passenger without a passenger ticket having been delivered, etc.," it can only be referring to the carrier's failure to deliver any document whatever, or its delivery of a document whose shortcomings are so extensive that it cannot reasonably be described as a "ticket" (for example, a mistakenly delivered blank form, with no data filled in). Quite obviously, the use of 8-point type instead of 10-point type for the liability limitation notice is not a shortcoming of such magnitude; indeed, one might well select that as a polar example of what could not possibly prevent a document from being a ticket.[3]

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[3] JUSTICE BRENNAN accuses us of being "disingenuous" in saying that this is the only possible reading of Article 3. In the single paragraph supporting this accusation, he offers two arguments to show that Article 3 is "surely susceptible," *post*, at 137, of another interpretation. First, he thinks it "not at all unreasonable to read the term 'passenger ticket,' when used . . . in Article 3(2)" to mean, *not* what it meant in Article 3(1), but rather to be a "shorthand for [the] longer phrase" consisting of *all* the requirements that Article 3(1) says a passenger ticket must contain. It seems to us that this suggested reading *is* unreasonable—not only because no sensible draftsman would use such strange "shorthand" instead of referring, in Article 3(2), to "*such a* passenger ticket" rather than simply "passenger ticket," but also because the result produced by the suggested reading is nonsensical. The effect of the concurrence's exegesis can be assessed by substituting for the phrase "the passenger ticket" in Article 3(2) the phrase "a regular passenger ticket"—by which we mean (as does the concurrence) a ticket in full compliance with Article 3(1). The first sentence of Article 3(2) then reads, in relevant part: "The . . . irregularity . . . of a regular passenger ticket shall not affect the existence or the validity of the contract of transportation." The only way out of this absurdity is to posit that by "irregularity" Article 3(2) means something other than failure to comply with all the requirements of Article 3(1)—but there is no plausible "something other."

JUSTICE BRENNAN's second argument is that the first sentence of Article 3(2) *"quite clearly," post*, at 137 (emphasis in original), does not have the meaning we have described. As he reads that sentence, when it says that an irregular ticket "shall none the less be subject to the rules of this convention" it means to include among those "rules" the rule of the second sentence, that (as he interprets it) if a "regular passenger ticket" is not delivered the rule limiting liability does not apply. Though this is put forward as a separate argument, it obviously assumes the correctness of the first one, since if "passenger ticket" in the second sentence does not mean a "regular passenger ticket" the "rule" of that second sentence does not

Besides being incompatible with the language of the Convention, the proposition that, for purposes of Article 3(2), delivering a defective ticket is equivalent to failure to deliver a ticket, produces absurd results. It may seem reasonable enough that a carrier "shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability" when the ticket defect consists precisely of a failure to give the passenger proper notice of those provisions. But there is no textual basis for limiting the "defective-ticket-is-no-ticket" principle to that particular defect. Thus, the liability limitation would also be eliminated if the carrier failed to comply, for example, with the requirement of Article 3(1)*(d)* that the ticket contain the address of the carrier.

The conclusion that defective compliance with the notice provision does not eliminate the liability limitation is confirmed by comparing Article 3(2) with other provisions of the Convention. Article 3 is a part of Chapter II of the Conven-

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apply to the delivery of an "irregular" ticket, as opposed to the delivery of no ticket at all. Quite apart from that flaw, however, it is impossible to read the second sentence as setting forth a "rule" that is included among the "rules" referred to in the first sentence, because that second sentence begins with the word "Nevertheless." It sets forth an *exception* to the operation of the first sentence—not a specification of something already included within it. The latter would be conveyed, not by a new sentence beginning "Nevertheless," but by a new clause beginning "including the rule that." As written, the second sentence plainly conveys the meaning that if the reason for the "absence" of a passenger ticket (covered by the first sentence) is that a passenger ticket *was never delivered*, the carrier shall "nevertheless"—*despite* the first sentence—be unable to avail himself of the rules excluding or limiting liability.

We may note that the alternative interpretation the concurrence believes it sees in the text—which would render the omission of any single particular listed in Article 3(1) a basis for imposing the sanction of the second sentence of Article 3(2)—is evidently not an interpretation that the concurrence itself is prepared to adopt, since it finds that to have been quite plainly rejected by the drafters. See *post*, at 146–147. Ultimately, then, even on its own terms the concurrence does not use the drafting history to resolve an ambiguity but rather to depart from any possible reading of the Treaty.

tion, entitled "Transportation Documents." Just as Section I of that Chapter (which includes Article 3) specifies what information must be included in passenger tickets, Sections II and III specify what information must be included in, respectively, baggage checks and air waybills for cargo. All three sections require, in identical terms, "[a] statement that the transportation is subject to the rules relating to liability established by this convention." Articles 3(1)*(e)*, 4(2)*(h)*, 8*(q)*. All three sections also provide, again in identical terms, that if the relevant document (ticket, baggage check, or air waybill) has not been delivered (or, in the case of air waybill, "made out"), the carrier "shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability." Articles 3(2), 4(4), and 9. But, *unlike Section I*, Sections II and III also specifically impose the latter sanction for failure to include in the documents certain particulars, including (though not limited to) the notice of liability limitation.[4] Sections II and III thus make doubly clear what the

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[4] The relevant provisions of Sections II and III are as follows:

"SECTION II. BAGGAGE CHECK

"*Article 4*

. . . . .

"(3) The baggage check shall contain the following particulars:

"*(a)* The place and date of issue;

"*(b)* The place of departure and of destination;

"*(c)* The name and address of the carrier or carriers;

"*(d)* The number of the passenger ticket;

"*(e)* A statement that delivery of the baggage will be made to the bearer of the baggage check;

"*(f)* The number and weight of the packages;

"*(g)* The amount of the value declared in accordance with article 22(2);

"*(h)* A statement that the transportation is subject to the rules relating to liability established by this convention.

"(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out text of Article 3(2) already indicates: that delivery of a defective document is something quite different from failure to deliver a document. And given the parallel structures of these provisions it would be a flouting of the text to imply in

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at *(d)*, *(f)*, and *(h)* above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

. . . . .

"SECTION III. AIR WAYBILL

. . . . .

"*Article 8*

"The air waybill shall contain the following particulars:

"*(a)* The place and date of its execution;

"*(b)* The place of departure and of destination;

"*(c)* The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercies that right the alteration shall not have the effect of depriving the transportation of its international character.

"*(d)* The name and address of the consignor;

"*(e)* The name and address of the first carrier;

"*(f)* The name and address of the consignee, if the case so requires;

"*(g)* The nature of the goods;

"*(h)* The number of packages, the method of packing, and the particular marks or numbers upon them;

"*(i)* The weight, the quantity, the volume, or dimensions of the goods;

"*(j)* The apparent condition of the goods and of the packing;

"*(k)* The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

"*(l)* If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

"*(m)* The amount of the value declared in accordance with article 22(2);

"*(n)* The number of parts of the air waybill;

"*(o)* The documents handed to the carrier to accompany the air waybill;

"*(p)* The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

"*(q)* A statement that the transportation is subject to the rules relating to liability established by this convention.

"*Article 9*

"If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8 *(a)* to *(i)*, inclusive, and *(q)*, the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability."

Section I a sanction not only withheld there but explicitly granted elsewhere. When such an interpretation is allowed, the art of draftsmanship will have become obsolete.

Petitioners and the United States as *amicus curiae* seek to explain the variance between Section I and Sections II and III (as well as the clear text of Article 3) as a drafting error, and lead us through the labyrinth of the Convention's drafting history in an effort to establish this point. It would be absurd, they urge, for defective notice to eliminate liability limits on baggage and air freight but not on personal injury and death. Perhaps not. It might have been thought, by the representatives from diverse countries who drafted the Convention in 1925 and 1929 (an era when even many States of this country had relatively low limits on wrongful-death recovery) that the $8,300 maximum liability established for personal injury or death was a "fair" recovery in any event, so that even if the defective notice caused the passenger to forgo the purchase of additional insurance, he or his heirs would be treated with rough equity in any event. Cf. C. McCormick, Law of Damages § 104 (1935) ("In about one-third of the states, a fixed limit upon the recovery under the Death Act is imposed in the statute. The usual limit is $10,000, but in some instances the maximum is $7,500 or $5,000"). Quite obviously, however, the limitation of liability for baggage and freight (about $16.50 per kilogram, see Article 22(2)) was not set with an eye to fair value (the very notion of a "fair" average value of goods per kilogram is absurd), but perhaps with an eye to fair level of liability in relation to profit on the carriage—so that the shipper of lost goods misled by the inadequate notice would not be compensated equitably. Another possible explanation for the difference in treatment is that the limitations on liability prescribed for baggage and freight are much more substantial and thus notice of them is much more important. They include not just a virtually nominal monetary limit, but also total exclusion of liability for "an error in piloting, in the handling of the aircraft, or in navigation." Article 20. Or perhaps the difference in treatment can be traced to a belief that people were much more likely, if adequate notice was given, to purchase additional insurance on goods than on their own lives—not only because baggage and freight are lost a lot more frequently than passengers, but also because the Convention itself establishes, in effect, an insurance-purchasing counter at the airport for baggage and freight, providing that if the consignor makes "a special declaration of the value at delivery and has paid a supplementary sum if the case so requires," the carrier will be liable for actual value up to the declared sum. Article 22(2); see also Articles 4*(g)*, 8*(m)*.

These estimations of what the drafters might have had in mind are of course speculation, but they suffice to establish that the result the text produces is not necessarily absurd, and hence cannot be dismissed as an obvious drafting error. We must thus be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history that petitioners and the United States have brought to our attention. The latter may of course be consulted to elucidate a text that is ambiguous, see, *e. g.*, *Air France* v. *Saks*, 470 U. S. 392 (1985). But where the text is clear, as it is here, we have no power to insert an amendment.[5] As Justice Story wrote for the Court more than a century and a half ago:

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[5] Even if the text were less clear, its most natural meaning could properly be contradicted only by clear drafting history. It is interesting, therefore, that the concurrence, after performing the examination we consider inappropriate, concludes that it is "impossible to say with certainty what the treatymakers at Warsaw intended." *Post*, at 146. One would think that would be enough to cause the concurrence to resort to the treaty's text. Instead, however, the concurrence shifts to an entirely different mode of analysis—one that it could as well have employed at the outset were it not intent upon demonstrating the technique of pursuing drafting history to a dead end. In its last four pages, the concurrence assumes for the sake of argument that there is an "adequate notice" requirement in the Warsaw Convention—an assumption that it justifies by the fact that

> "[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind." *The Amiable Isabella*, 6 Wheat. 1, 71 (1821).

For the reasons given above, we agree with the opinion of the Supreme Court of Canada, see *Ludecke* v. *Canadian Pacific Airlines, Ltd.*, 98 D. L. R. 3d 52 (1979), that the Warsaw Convention does not eliminate the limitation on damages for passenger injury or death as a sanction for failure to provide adequate notice of that limitation. Accordingly, we affirm the judgment of the District of Columbia Circuit.

So ordered.

"[c]ourts in this country have generally read [such a] requirement into the Warsaw Convention." *Post*, at 149. Of course they have read in such a requirement, and of course determining the validity of doing so—rather than assuming it—was the very reason we selected this case for review. The object of our granting writs of certiorari on points of statutory or treaty interpretation is to determine the correctness of fundamental points that lower courts have resolved, not to assume those points to be correct in order to decide particular cases on reasoning useless elsewhere. The concurrence's analysis provides guidance in all cases where notice of liability limitation is provided in 8-point rather than 10-point type. Four-point type, we are told, "may well" yield a different result, see *post*, at 150—always assuming, of course (what the concurrence does not venture to decide) that the Convention contains an "adequate notice" requirement. As for 6-point type, we have no hint whether that might entail liability—if there is any liability for inadequate notice. We choose not to follow a mode of analysis that seems a wasteful expenditure of this Court's time.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in the judgment.

If I may paraphrase Justice Harlan: I agree that the interpretation of the Warsaw Convention advanced by petitioners should be rejected, but I consider it entitled to a more respectful burial than has been accorded.[1] Over the last 25 years, petitioners' argument has been accepted, until the present litigation, by virtually every court in this country that has considered it. One such judgment was affirmed here by an equally divided Court. It is a view of the Convention that has consistently been adopted by the Executive Branch, and which is pressed on us in this case by the United States as *amicus curiae*. It deserves at least to be stated in full, and to be considered without the self-affixed blindfold that prevents the Court from examining anything beyond the treaty language itself.

The Court holds that the sanction of Article 3(2), which consists of the loss of the Convention's limitation on liability under Article 22(1), applies only when no passenger ticket at all is delivered. That is a plausible reading, perhaps even the most plausible reading of the language of the Convention. But it is disingenuous to say that it is the only possible reading. Certainly it is wrong to disregard the wealth of evidence to be found in the Convention's drafting history on the intent of the governments that drafted the document. It is altogether proper that we consider such extrinsic evidence of the treatymakers' intent. See *Air France* v. *Saks*, 470 U. S. 392, 396, 400 (1985); *Société Nationale Industrielle Aérospatiale* v. *United States District Court*, 482 U. S. 522, 534 (1987); *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U. S. 694, 700–702 (1988). The drafters of an international treaty generally are, of course, the instructed representatives of the governments that ultimately ratify the treaty. The record of their negotiations can provide helpful clues to those governments' collective intent, as it took shape during the negotiating process.[2]

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[1] Cf. *Gideon* v. *Wainwright*, 372 U. S. 335, 349 (1963) (Harlan, J., concurring).

There is strong evidence that the drafters of the Warsaw Convention may have meant something other than what the Court thinks that document says. In the first place, the text of the Convention is surely susceptible of an interpretation other than the Court's. Article 3(1) describes as follows what it is the carrier must deliver: "[A] passenger ticket which shall contain the following particulars . . . ." I think it not at all unreasonable to read the term "passenger ticket," when used subsequently in Article 3(2), as shorthand for this longer phrase. The first sentence of Article 3(2), moreover, *quite clearly* does not have the meaning the Court ascribes to it. *Ante*, at 128. That sentence provides that the "absence, irregularity, or loss" of a ticket shall not affect the validity of the contract, "which shall none the less be subject to the rules of this convention." Those rules include the one laid down in the very next sentence, *i. e.*, the provision for loss of the liability limitation. Thus, there exists a contract even if the ticket is absent or "irregular," and that contract is still governed by *all* of the provisions of the Convention, one of which denies the carrier the benefit of the liability limit under certain conditions.[3] The intent of Article 3(2), as a whole, is surely to hold the carrier to the obligations, but to deny it the benefits, of the Convention, if it fails to comply with certain requirements.[4]

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[2] Sometimes, of course, a state may become a party to an international convention only after it has entered into force, without having participated in its drafting. Thus, the United States was not represented at Warsaw and adhered to the Convention only in 1934. But to say that for that reason the drafting history of an international treaty may not be enlisted as an aid in its interpretation would be unnecessarily to forgo a valuable resource. We do not, after all, find it necessary to disregard the drafting history of our Constitution, notwithstanding that 37 of the 50 States played no role in the negotiations and debates that created it.

The United States Senate's consent to the Warsaw Convention was given without any hearings or debate. See *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U. S. 243, 273 (1984) (STEVENS, J., dissenting). There is, therefore, no issue in this case as to the proper use of preratification Senate materials in treaty interpretation. Cf. *United States* v. *Stuart*, 489 U. S. 353, 367–368, n. 7 (1989).

Thus, the language of Article 3 does not, to say the least, exclude the interpretation that failure to provide the required notice results in loss of the limitation on liability.[5] On the other hand, the difference between the language of Article 3 and that of Articles 4 and 9 casts some doubt on that reading. Evidence from the drafting history of the Convention is therefore helpful in understanding what the contracting governments intended.

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[3] Because I think the meaning of this sentence is clear, I must respectfully disagree with the position taken by the Supreme Court of Canada in *Ludecke* v. *Canadian Pacific Airlines, Ltd.*, 98 D. L. R. 3d 52, 57 (1979), which was based on the same erroneous interpretation this Court now gives to the first sentence of Article 3(2).

[4] This intent, which emerges clearly from a careful reading of Article 3(2), is also apparent from the drafting history of the Convention. See, *e. g.*, App. to Brief for United States as *Amicus Curiae* 35a–37a, 47a–49a (hereinafter U. S. App.). (This and subsequent citations to the appendix to the Government's brief are in pairs of page references: the first reference is to the original French document, and the second to an English translation provided by the Solicitor General.)

[5] The Court's difficulty in accepting this point, see *ante*, at 129–130, n. 3, results precisely from the misplaced literalism and disregard of context already evident in its approach to this treaty. Without responding in detail to its literalist critique, I will say this: If one wades through the minutes of the Comité International Technique d'Experts Juridiques Aériens (CITEJA) meetings and of the Warsaw Conference, as well as the various drafts that were produced en route to the final Convention, one finds virtually no support for the Court's theory of what Article 3 means. For the Court's theory of the first sentence of Article 3(2) one finds absolutely none, and plenty that makes it most unlikely that the drafters intended the reading the Court gives. I set out some of this in the text below. For a starter, one might look at the draft of Article 3 presented to the Warsaw Conference, see n. 8, *infra*, where what are now the first and second sentences of Article 3(2) were in completely separate paragraphs, without any "[n]evertheless." Of course the Conference might have decided to make a substantive change, but one searches in vain through its minutes for any indication of such intent. I think it more likely that when the two paragraphs were combined in final drafting the word "[n]evertheless" *("toutefois")* was placed between them as a transition.

The Convention was drafted between the first and second international conferences on private aviation law, held, respectively, in Paris in 1925 and Warsaw in 1929. The drafting work was done by a committee of experts, CITEJA, and particularly by the committee's Second Commission, during a series of meetings in 1927 and 1928. See generally M. Smirnoff, Le Comité International Technique d'Experts Juridiques Aériens (1936). The text CITEJA presented at the Second International Conference on Private Aviation Law in Warsaw in 1929 was amended in a number of respects before its adoption and submission to the several governments for ratification. Without tracing the evolution of the draft convention in detail, several important themes can be discerned from CITEJA's drafts and minutes.

First, it is abundantly clear that throughout the entire drafting process the delegates intended to apply the same regime of sanctions for failure to comply with the provisions concerning passenger tickets, baggage checks, and air waybills. The initial object of CITEJA's work was the preparation of a convention on the air waybill for the transport of freight. In this phase, its draft contained the requirement that the waybill include various "particulars" (Article 7), as well as a statement that the transportation was subject to the Convention's rules relating to liability (Article 8). The sanction for failure to comply was clear: "If an air waybill containing all the particulars set out in Article 7(a) through (g) and by Article 8 has not been made out for international transportation, the carrier shall still be subject to the rules of the International Convention on liability, but the carrier shall not be entitled to avail himself of those provisions of this Convention that exclude his own liability, release him from responsibility for the errors of his agents, or limit his liability." U. S. App. 43a–44a, 55a–56a.

Subsequently, CITEJA determined to merge the air waybill convention with proposed modifications to an international liability convention adopted in 1925. *Id.*, at 46a, 58a. At the third session of CITEJA in May 1928, the Second Commission presented a draft convention which, in its Article 3, contained provisions similar to those foreseen for the air waybill in the previous draft. Thus, the passenger ticket was to include four listed particulars, as well as "a statement that the transportation is subject to the rules relating to liability established by this Convention." The same Article, as amended during the session, provided: "If, for international transportation, the carrier accepts a passenger without a passenger ticket having been made out, or if the ticket does not contain the above-mentioned particulars, the contract is still subject to the rules of this Convention, but the carrier shall not be entitled to avail himself of those provisions of this convention which totally or partially exclude his direct liability or liability derived from the negligence of his agents." *Id.*, at 72a, 91a.[6] Similar provisions were adopted in regard to the baggage check. See *id.*, at 76a–77a, 95a–96a. The report submitted by Henry de Vos, Reporter of the Second Committee, to the full CITEJA, made crystal clear the parallelism of approach adopted for the three types of transportation documents: "[T]he sanction for transporting passengers without regular tickets is the same as that for the transportation of baggage and of goods." *Id.*, at 73a, 92a. Similarly, the report Monsieur de Vos prepared on behalf of CITEJA to accompany its final draft of the Convention contained the following observation: "[T]he sanction provided . . . for carriage of passengers without a ticket *or with a ticket not conforming*

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[6] As originally presented to CITEJA, the triggering clause read: "without a passenger ticket containing the particulars indicated above having been made out." U. S. App. 62a, 82a. The change in language was made in order to exclude the interpretation that the transporter could escape from the obligations of the Convention simply by issuing no passenger ticket at all. See *id.*, at 70a–71a, 90a–91a.

to the Convention is identical to that provided . . . for carriage of baggage and goods." Second International Conference on Private Aeronautical Law Minutes 247 (R. Horner & D. Legrez transl. 1975) (emphasis added) (hereinafter Horner & Legrez).[7]

A second observation that can be drawn from the drafting history relates to the purpose of the sanctions clause. This was simply the means chosen by the drafters to compel the air carriers to include on the transportation documents certain "particulars" thought necessary. During the initial stages the drafters had considered requiring the adhering states to impose criminal or civil penalties for failure to comply with the Convention's specifications, but they ultimately accepted a British suggestion that loss of the Convention's benefits should be used as the means of compelling compliance. U. S. App. 35a–36a, 47a–49a, 42a, 54a–55a, 63a, 82a–83a. Thus, the sanction was applied to the failure to include on the transportation documents all of the particulars thought to be essential, but not to certain others whose inclusion was merely recommended. The term "obligatory" was frequently used to refer to the former group. The obligatory particulars were, generally speaking, those relating to the international character of the transportation. *Id.*, at 41a, 54a. These included "[t]he name and address of the carrier." *Id.*, at 43a, 55a. One might today deem that particular unnecessary to demonstrate the international character of the transportation, but that was apparently not the judgment of the drafters, who debated precisely this sort of question, *id.*, at 62a–64a, 82a–83a, and who saw the severe penalty as being the only practicable means of compelling the carriers to include on the travel documents the particulars the drafters considered essential. (The carrier's address might also have been thought necessary to establish the carrier's domicile for jurisdictional purposes under Article 28.) Thus, what the Court considers an "absurd resul[t]," *ante*, at 130, was one precisely intended (at least until the draft reached the Conference floor) by the authors of the Warsaw Convention.

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[7] The minutes of the Warsaw Conference are cited here in English translation. For the French original documents, see 2 Conférence Internationale de Droit Privé Aérien, 4–12 Octobre 1929, Varsovie (1930).

Several conclusions can be drawn from the final draft CITEJA submitted to the Warsaw Conference. First, it is absolutely clear that under this draft the carrier was to lose the benefit of the liability limitation if it delivered a passenger ticket that did not contain the listed particulars. See Horner & Legrez 258 ("If . . . the carrier accepts the traveler without having drawn up a passenger ticket, *or if the ticket does not contain the particulars indicated hereabove* . . .") (emphasis added). What is somewhat less clear is whether the clause stipulating that the transportation was subject to the liability provisions of the Warsaw Convention was among those "particulars." Article 3 referred to "the particulars indicated hereabove"; and while the clause in question was mentioned just above, it was not listed under a letter of the alphabet like the others, but was in a separate paragraph.[8]

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[8] Article 3, as presented to the conference by CITEJA, read as follows:

"In the carriage of travelers the carrier shall be required to deliver a passenger ticket which shall contain the following particulars:

"(a) the place and date of issue;

"(b) the points of departure and of destination;

"(c) summary indication of the route to be followed (via) as well as the contemplated stopping places;

"(d) the name and address of the carrier or carriers.

"The passenger ticket shall contain, moreover, a clause stipulating that the carriage is subject to the system of liability set forth by the present Convention.

"The absence, irregularity, or loss of this document of carriage shall not prejudice either the existence or the validity of the contract of carriage.

"If, for international carriage, the carrier accepts the traveler without having drawn up a passenger ticket, or if the ticket does not contain the particulars indicated hereabove, the contract of carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which

The parallel provision of Article 4, on the baggage check, was even more ambiguous on this point: while there, too, the liability clause was referred to in a separate paragraph, following particulars lettered (a) through (f), the penalty provision referenced only the failure to issue a ticket that included particulars (a) through (d).[9] The provisions on the air waybill, on the other hand, specified clearly that failure to include the liability statement would result in loss of the liability limit.[10]

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exclude in all or in part his direct liability or that derived from the faults of his servants." Horner & Legrez 258–259.

[9] Article 4, as presented to the conference, read as follows:

"In the carriage of baggage, other than small personal objects of which the passenger himself retains custody, the carrier shall deliver a baggage check.

. . . . .

"It shall contain the following particulars:

"(a) the place and date of issue;

"(b) the points of departure and of destination;

"(c) summary indication of the route to be followed (via) as well as the contemplated stopping places;

"(d) the name and address of the carrier or carriers;

"(e) the number of the passenger ticket;

"(f) indication that the check is made out in duplicate;

"(g) indication that the delivery of the baggage to the traveler shall be validly made to the bearer of the check.

"The baggage check shall contain, moreover, a clause stipulating that the carriage is subject to the system of liability set forth by the Convention.

"The absence, irregularity, or loss of this baggage check shall not prejudice either the existence or the validity of the contract of carriage.

"If, for international carriage, the carrier accepts baggage without having made out a ticket, or if the ticket does not contain the particulars indicated hereabove up to and including (d), the contract of the carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention, which exclude in all or in part his direct liability or that derived from the faults of his servants." *Id.*, at 259.

[10] Article 8, as presented to the conference, specified 15 particulars the waybill was to contain, of which those lettered (a) through (g) were stated to be compulsory. A separate Article 9 read in full as follows: "The air waybill shall contain a clause stipulating that the carriage is subject to the

At Warsaw, the Japanese delegation, recognizing the just-mentioned ambiguity, proposed an amendment to Articles 3 and 4, which resulted in the reordering of the liability clause as a lettered "particular." The purpose of the change was to make clear that the liability clause was to be treated as obligatory, Horner & Legrez 310, *i. e.*, that its omission would result in loss of the limit on liability. This amendment was apparently regarded merely as a technical question of wording, *id.*, at 272, and it engendered no floor discussion. Had only this amendment been adopted, it would have been clear beyond doubt that failure to include the required statement on the passenger ticket would result in loss of the liability limit. But a second relevant amendment was also adopted, and it produced a much more ambiguous document.

Throughout CITEJA's work on the draft Convention, the Greek delegation had repeatedly objected to the sanctions clause as too harsh. U. S. App. 39a, 51a; 62a–64a, 82a–83a. Its effort at the May 1928 CITEJA meeting to weaken the sanction, by specifying that it should apply only when prejudice was caused by the omission of a particular, was rejected. *Id.*, at 63a–64a, 83a. But at Warsaw, for reasons which do not emerge from the record, a similar Greek amendment, Horner & Legrez 303–304, met with more success. The preparatory committee accepted it to the extent of deleting from Article 3(2) the words, "or if the ticket does not contain the particulars indicated above." *Id.*, at 150.[11] The parallel

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system of liability set forth by the present Convention." Finally, Article 17 provided: "If, for international carriage the carrier accepts goods without having made out an air waybill, or if the air waybill does not contain all the indications set forth by Article 8 (a) through (g) inclusive, *and by Article 9*, the contract of carriage shall nonetheless be subject to the rules of the present Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which exclude in all or in part his direct liability or that derived from his servants." *Id.*, at 260–264 (emphasis added).

[11] Since the Greek amendment was classified as one of secondary importance, it was considered in the "preparatory committee," which made no record of its debates, rather than on the floor. Thus, the only clues as to

provision in Article 4 was treated somewhat differently. A change was made in which particulars were deemed obligatory, but three—including the liability statement which became particular *(h)*—remained so; thus, the phrase used in the sanctions clause was "or if the baggage check does not contain the particulars set out at *(d)*, *(f)*, and *(h)* above." *Id.*, at 156. Articles 8 and 9, concerning the air waybill, were rewritten in a similar fashion. *Id.*, at 157–162.

It is not clear what the reason is for the difference between the final structure of Article 3, on one hand, and Articles 4 and 9, on the other. The Solicitor General views it essentially as a drafting error, resulting from a failure to coordinate the Japanese and Greek amendments. Brief for United States as *Amicus Curiae* 18–21. It is, to be sure, possible that the drafters intended to create a different regime for the passenger ticket than for the baggage check and the air waybill. The latter reading draws some support from the Reporter's explanation of the changes made in Article 4 concerning the baggage check: "The last paragraph was not modified like Article 3; that is to say that we have retained the same sanctions in the case of errors in the particulars . . . ." Horner & Legrez 156. But it is puzzling that such a departure from the fundamental principle of applying the same scheme of sanctions to the passenger ticket, the baggage check, and the waybill would have been made without explanation or acknowledgment. As late as the opening substantive session of the Warsaw Conference itself the CITEJA Reporter, Monsieur de Vos, made clear, as he had at the foregoing CITEJA sessions, the principle of parallel treatment of these three documents.[12] Only four days later

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the reason for the change come from the wording of the Greek proposal and from the comments of the Reporter in presenting the preparatory committee's work to the plenary session.

[12] "In Chapter 2, we examine the matter of transport documents: passenger ticket, baggage check, air waybill for goods. All these documents contain a minimum of particulars.

"The essential thing, in this regard, is the sanction, sanction provided for the three documents, which consists in depriving the carrier who would

Monsieur de Vos himself presented to the convention the preparatory committee's revision of Article 3; and it is difficult to imagine that, had such a fundamental change on this point been intended, he would not have said so explicitly.

An examination of the Greek proposal that led to the change, as well as what Monsieur de Vos said in presenting it, strengthens the impression that no different treatment of the passenger ticket was intended. The Greek proposal referred to the possibility that the carrier might lose its liability limitation because "by simple negligence the carrier has omitted to mention in the passenger ticket the place of issuance, or the point of departure, or his name and address; or even that he keep his former address in the ticket, or finally he does not point out an intermediate stop." Horner & Legrez 303. The Reporter, in presenting the revision of Article 3 to the plenary session, characterized the Greek concern as follows: "[T]he sanction is too severe when it's a question of a simple omission, of the negligence of an employee of the carrier . . . ." *Id.*, at 150. The focus thus appears to have been on clerical errors in filling in the ticket forms. An intent to remove such errors from the list of those that trigger the sanction—as was done also in Article 4 (but not in Article 8)—would not be incompatible with the intent to retain the sanction for failure to include the liability statement, which would hardly result from the same kind of ticket-counter error.

While the record that has been preserved makes it impossible to say with certainty what the treatymakers at Warsaw intended, the explanation that they contemplated only the removal of the four initial particulars from the scope of the sanctions clause finds considerable support in the available evidence. Since at the time the Greek amendment was discussed the liability statement constituted a separate paragraph, rather than being listed as letter *(e)* as it later was, it

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carry travelers or goods without documents or with documents not conforming to the Convention, of the benefit of the advantages provided by the Convention." Horner & Legrez 19–20.

is conceivable that the preparatory committee removed the words "or if the ticket does not contain the particulars indicated above," without intending to make the liability statement any less obligatory here than in Articles 4 and 9.

The Court offers several hypotheses as to why the drafters of the Convention might have determined to treat the notice requirement differently for the passenger ticket and the baggage check. *Ante*, at 133–134. Such explanations are, however, difficult to square with the actual history of the Convention's drafting. The final text clearly imposes sanctions for omission of the notice in Article 4, whereas Article 3 is ambiguous on this point; but this was not the case in the draft CITEJA presented to the conference. There, if anything, the sanction applied more clearly to the failure to give notice under Article 3 than under Article 4. *Supra*, at 142–143. If there was any reason, therefore, for according the notice requirement less weight in Article 3 than in Article 4, it must have emerged at the Warsaw Conference itself. But there is no trace of such a purpose in the Warsaw minutes, as there surely would have been had a decision been made to reverse the relative treatment of the Article 3 and 4 sanctions provisions in the previous draft. It seems much more likely, therefore, that the difference between Articles 3 and 4 on this point was an unintended consequence of other changes that were made at the conference.[13]

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[13] There is an alternative explanation of the difference in language used in the Articles on the passenger ticket, baggage check, and waybill. The term "passenger ticket" can, as already noted, be read to refer to a ticket that contains all of the particulars listed in Article 3(1) (*i. e.*, including the first four, which establish the international character of the transportation). This appears to be the interpretation of Y. Blanc-Dannery, La Convention de Varsovie et les Règles du Transport Aérien International 23–37 (1933). She states flatly: "Article 3 makes no distinction among the particulars: 'the carrier must deliver a passenger ticket which shall contain the following particulars.' Stated differently, all are obligatory." *Id.*, at 28 (translation mine). This is also the conclusion reached by the Quebec Court of Appeal in *Ludecke* v. *Canadian Pacific Airlines, Ltd.*, 53 D. L. R. 3d 636, 638 (1974) ("[T]he carrier must deliver a ticket which sat-

Even if we agree, however, that Article 3 of the Warsaw Convention removes the liability limit for failure to provide notice that the transportation is governed by the Convention's liability provisions,[14] that does not end the matter.

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isfies the mandatory requirements of art. 3(1) which article is in effect, a definition. If the ticket delivered does not satisfy these requirements it is not a ticket within the meaning of that article and the sanction of art. 3(2) will apply"), appeal dism'd, 98 D. L. R. 3d 52 (Can. 1979). If "passenger ticket" is read in this manner, then it is also possible to understand the last-minute change in the status of the first four particulars listed in Article 4. See n. 9, *supra*. At the same time that these were made nonobligatory on the baggage check, mention of the number of the passenger ticket became an obligatory particular on the baggage check (now Article 4(3)*(d)*). This cross-reference to the passenger ticket may have been seen to make it unnecessary to require that the first four particulars listed there be repeated on the baggage check. This reading harmonizes the treatment of all three transportation documents in regard to these four particulars: they are obligatory in all three cases (this is undisputed in the case of the waybill), although for the baggage check this is accomplished through incorporation by reference of the passenger ticket.

It should be noted, however, that other commentators take a different view. According to D. Goedhuis, National Airlegislations and the Warsaw Convention 152–153 (1937), the Greek amendment established a difference between the sanction provisions of Articles 3 and 4, and the carrier is not bound to include any particulars at all on the passenger ticket. See also G. Miller, Liability in International Air Transport 83, 92 (1977).

[14] In 1955 the Warsaw Convention was amended in a number of respects by the Hague Protocol. Notably, Article 3 was amended to make absolutely clear that the liability limit would not apply if the carrier did not give notice that the Convention's liability limitations governed. See Article III, Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, 478 U. N. T. S. 371, 374–377 (1955). Had the United States ratified the Hague Protocol, its amendments would have been dispositive of the question we have been discussing thus far. It did not do so, however, largely because of dissatisfaction with the Convention's low liability limit, even as doubled by the Hague amendments. See Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497 (1967).

The parties in this case disagree over what the Hague amendment of Article 3 implies about the meaning of the unamended Convention. Compare Brief for Petitioners 37–38 with Brief for Respondent 22–28. Since it is

Respondent Korean Air Lines undeniably did give petitioners such notice. Petitioners' argument goes beyond this, however, and requires us to determine whether there exists a requirement that the notice given be "adequate," and, if so, whether the notice provided in this case met that standard.

Courts in this country have generally read an "adequate notice" requirement into the Warsaw Convention. Thus, notice has been held to be inadequate when it was provided under conditions that did not permit the passenger to act on it (by, for example, purchasing additional insurance). *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851, 856–858 (CA2) (ticket delivered after passenger boarded airplane), cert. denied, 382 U. S. 816 (1965); *Warren* v. *Flying Tiger Line, Inc.*, 352 F. 2d 494 (CA9 1965) (ticket delivered at foot of ramp to airplane). Closer to the present situation is the much-noted case of *Lisi* v. *Alitalia-Linee Aeree Italiane, S. p. A.*, 370 F. 2d 508 (CA2 1966), aff'd by equally divided Court, 390 U. S. 455 (1968). There the court characterized the Warsaw Convention notice given by the carrier in 4-point type as "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract'" and as "virtually invisible." 370 F. 2d, at 514. The court therefore held that the ticket had not been "'delivered to the passenger in such a manner as to afford him a reasonable opportunity to take self-protective measures . . . .'" *Id.*, at 513, quoting *Mertens*, *supra*, at 857. More recently two appellate courts, relying on the Montreal Agreement, have held notice in 8.5-point and 9-point type to be inadequate. *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F. 2d 85 (CA2), cert. denied *sub nom. Polskie Linie Lotnicze* v. *Robles*, 464 U. S. 845 (1983); *In re Air Crash Disaster Near New Orleans, Louisiana, on July 9, 1982*, 789 F. 2d 1092, 1098 (CA5), rehearing granted,

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possible to conclude either that the delegates at The Hague thought they were making a substantive change in Article 3(2), or that they merely intended to clarify ambiguous language, the Hague amendments are ultimately of little help in ascertaining the meaning of the original Convention.

795 F. 2d 381 (1986) (en banc), reinstated, 821 F. 2d 1147, 1171 (1987) (en banc).

If notice is indeed required, it must surely meet some minimal standard of "adequacy." All would agree, no doubt, that notice that literally could be read only with a magnifying glass would be no notice at all. *Lisi*, of course, presents a more difficult case. In my view it may well have been correctly decided. But there is a substantial difference between 4-point and 8-point type, particularly where, as here, the notice took the form of the "advice" prescribed by the Montreal Agreement and occupied a separate page in the ticket book. It cannot be said that the notice given here was "camouflaged in Lilliputian print in a thicket of [other conditions]."

The *Warsaw* and *New Orleans* courts did not, of course, find that to be the case where notice was given in 8.5- and 9-point type. Rather, those courts adopted a bright-line rule based on the provision of the Montreal Agreement that requires notice printed in 10-point type. Petitioners here similarly contend that the Montreal Agreement established a bright line which should be taken to define what notice is adequate. I cannot accept this argument. The Montreal Agreement is a private agreement among airline companies, which cannot and does not purport to amend the Warsaw Convention. To be sure, the Agreement was concluded under pressure from the United States Government, which would otherwise have withdrawn from the Warsaw Convention. See Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 546–596 (1967). And most air carriers operating in the United States are required by Federal Aviation Administration (FAA) Regulations to become parties to the agreement. See 14 CFR pt. 203, § 213.7 (1988); see also 14 CFR § 221.175(a) (1988) (requiring notice of liability limit in 10-point type). But neither the Montreal Agreement nor the federal regulations purport to sanction failure to provide notice according to the Agreement's specifications with loss of the Warsaw

Convention's limits on liability. The sanction, rather, can be only whatever penalty is available to the FAA against foreign airlines that fail to abide by the applicable regulations, presumably including suspension or revocation of the airline's permit to operate in the United States. See 49 U. S. C. App. § 1372(f).[15]

Nor does the Solicitor General contend in this case that the Montreal Agreement provides for loss of the liability limit in the event of failure to give the specified notice in 10-point type. His argument is, rather, that the Montreal Agreement and the FAA regulation codified at 14 CFR § 221.175(a) (1988) set a clear and reasonable standard which the courts should adopt as a measure of "adequate notice." Brief for United States as *Amicus Curiae* 24–27. Here, however, the notice given was surely "adequate" under any conventional interpretation of that term. That being so, I cannot agree that we have any license to require that the notice meet some higher standard, merely for the sake of a bright line.[16]

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[15] In *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 705 F. 2d 85, 90 (CA2), cert. denied *sub nom. Polskie Linie Lotnicze* v. *Robles*, 464 U. S. 845 (1983), the Court of Appeals' analysis to the contrary was based in large part on the fact that "[w]ithdrawal of the Denunciation [by the United States of the Warsaw Convention] and the CAB's acceptance of the Montreal Agreement indicates a judgment by at least the executive branch that 10-point type was necessary to provide sufficient notice . . . ." 705 F. 2d, at 90. While we surely owe considerable deference to the views of the Executive Branch concerning the meaning of an international treaty, *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 184–185 (1982), I do not understand the United States' acceptance of the Montreal Agreement to have been based on its legal opinion on the type size the Warsaw Convention required. Rather, the Government's actions in connection with the Montreal Conference were based on political goals concerning desirable modifications of the existing conditions of international air travel by American passengers. See Lowenfeld & Mendelsohn, 80 Harv. L. Rev., at 546–596. Such circumstances do not call for particular deference to the position taken by the Executive Branch.

[16] Contrary to the Court's belief, *ante*, at 134–135, n. 5, I do *not* assume that an adequate notice requirement exists because courts in this country have generally so held. I take note of those holdings and of the argument advanced by petitioners. I then accept the argument that some minimal

This case is, in my view, far more complex and difficult than the Court would have it. I am prepared to accept petitioners' position that the Warsaw Convention does sanction failure to provide notice of its applicability with loss of its limit on liability. Having come that far, I think one must agree as well that notice that is not minimally legible, at the least, is no notice at all. But I cannot make the leap from there to the view that KAL's 8-point notice was inadequate, as a matter of interpretation of the Warsaw Convention, simply because of the carrier's obligation under a related agreement to provide 10-point notice. I therefore concur in the Court's judgment that respondent has not lost the benefit of the Convention's limit on liability because of the size of the type used in its notice.

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level of adequacy is required, but I have no difficulty in determining that the notice given here was adequate. I express no opinion on the adequacy of notice in 6-point type, because that is not the case before us.

AMERICAN FOREIGN SERVICE ASSOCIATION ET AL. v. GARFINKEL, DIRECTOR, INFORMATION SECURITY OVERSIGHT OFFICE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 87–2127. Argued March 20, 1989—Decided April 18, 1989

Standard Form 189, devised by appellee Director of the Information Security Oversight Office (DISOO), and Form 4193, created by appellee Director of Central Intelligence (DCI), forbade certain Executive Branch employees to reveal classified or "classifiable" information to persons not authorized to receive such information, making clear that if they did so they could lose their security clearances, their jobs, or both. The DISOO, but not the DCI, defined the term "classifiable." Although § 630 of the Continuing Resolution for fiscal year 1988 prohibited the expenditure of that year's funds for the implementation or enforcement of, *inter alia,* the forms, both forms continued to be used. Appellant American Foreign Service Association and others filed suit in the District Court challenging the use of the forms on the ground that they violated § 630, and seeking declaratory and injunctive relief that would, among other things, direct appellees to notify all employees who signed either form after the effective date of § 630 that the agreements were void and that their terms could not be enforced during fiscal year 1988. The lawsuit was consolidated with other suits seeking to enjoin the forms' use on the ground, *inter alia,* that the term "classifiable" was so vague and overbroad that it inhibited employees' speech in violation of the First Amendment. The District Court assumed that the Executive Branch's actions since § 630's enactment did not comply with the section's requirements but granted summary judgment in favor of appellees on the ground that § 630 was an unconstitutional interference with the President's authority to protect the national security. While the court's judgment was pending review in this Court, the District Court ruled on the constitutional challenge in the cases consolidated with appellants' suit. It concluded that the term "classifiable" is unconstitutionally vague, but that the DISOO's definition would remedy the vagueness. It also ordered appellees to notify employees either that this definition was in force or that no penalties would be imposed for the disclosure of "classifiable" information. Thereafter, appellees deleted the word "classifiable" from the forms, replacing it with the

DISOO's definition, and gave individualized notice of this change to current employees.

Held:

1. The controversy is moot as to current employees who have been notified that the term "classifiable" no longer controls their disclosure of information. P. 159.

2. The case is remanded to the District Court for it to address in the first instance: (1) with respect to appellants' request for individualized notice to former employees, whether individualized notice is required by § 630 and whether appellants' complaint can be read to request such notice for former employees; (2) with respect to appellants' argument that the DISOO's definition of "classified" does not comply with § 630, whether appellants should be allowed to amend their complaint to take into account this new definition; and (3) with respect to appellants' argument that the forms do not comply with the § 630 provisions dealing with disclosure of classified information to Congress, whether this part of the case is ripe for decision, since no instance in which an employee has sought to disclose information to Congress and was prohibited from doing so has been brought to this Court's attention. Pp. 159–161.

3. On remand, the District Court should decide first whether the controversy is sufficiently live and concrete to be adjudicated and whether it is an appropriate case for equitable relief, and then decide whether the statute and forms are susceptible of a reconciling interpretation. Only if they are not should the court turn to the constitutional question whether § 630 impermissibly intruded upon the Executive Branch's authority over national security information. Pp. 161–162.

688 F. Supp. 671, vacated and remanded.

Patti A. Goldman argued the cause for appellants. With her on the briefs were *Alan B. Morrison, Paul Alan Levy,* and *Susan Z. Holik.*

Edwin S. Kneedler argued the cause for appellees. With him on the brief were *Acting Solicitor General Bryson, Assistant Attorney General Bolton, Deputy Solicitor General Merrill, Barbara L. Herwig,* and *Freddi Lipstein.**

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union by *Kate Martin, Gary M. Stern, Steven R. Shapiro,* and *John A. Powell;* for the American Federation of Labor and Congress of Industrial Organizations et al. by *Robert M. Weinberg, Walter*

PER CURIAM.

As a condition of obtaining access to classified information, employees in the Executive Branch are required to sign "nondisclosure agreements" that detail the employees' obligation of confidentiality and provide for penalties in the event of unauthorized disclosure. Two such nondisclosure forms are at issue in this case. One, Standard Form 189, was devised by the Director of the Information Security Oversight Office (DISOO) (now appellee Garfinkel); the other, Form 4193, was created by the Director of Central Intelligence (DCI) (now appellee Webster). Both of these forms forbade employees to reveal classified *or* "classifiable" information to persons not authorized to receive such information, App. 15, 19, and made clear that employees who disclosed information in violation of these agreements could lose their security clearances, their jobs, or both. *Id.*, at 16, 21. Neither form defined the term "classifiable." The DISOO eventually promulgated a regulation that defined the term "classifiable" in Form 189 to include only unmarked classified information or unclassified information that was "in the process of a classification determination." Under this regulation, moreover, an employee would violate the nondisclosure agreement by disclosing unclassified information only if that employee "knows, or reasonably should know, that such information is in the process of a classification determination and requires interim protection." 52 Fed. Reg. 48367 (1987). For those employees who signed Form 4193, however, the DCI did not attempt to define "classifiable." More than half of the Federal Gov-

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Kamiat, Laurence Gold, George Kaufmann, Mark Roth, and *Charles A. Hobbie;* and for the Government Accountability Project et al. by *Joseph B. Kennedy.*

Briefs of *amici curiae* were filed for the United States Senate by *Michael Davidson, Ken U. Benjamin, Jr.,* and *Morgan J. Frankel;* and for the Speaker and Leadership Group of the United States House of Representatives by *Steven R. Ross* and *Charles Tiefer.*

ernment's civilian and military employees have signed either Form 189 or 4193. Brief for Appellants 5.

Section 630 of the Continuing Resolution for Fiscal Year 1988, Pub. L. 100–202, 101 Stat. 1329–432, enacted by Congress in 1987, prohibited the expenditure of funds in fiscal year 1988 for the implementation or enforcement of Form 189, Form 4193, or any other form that violated one of its five subsections.* In response to this statute, appellee Garfinkel ordered agencies to cease using Form 189, but several agencies nevertheless required approximately 43,000 employees to sign the form after § 630 was enacted. Brief for Appellants 10. The DCI, in contrast, continued to require employees to sign Form 4193, but attached a paragraph to the form stating that the nondisclosure agreement would

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*Section 630 provides:

"No funds appropriated in this or any other Act for fiscal year 1988 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement:

"(1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination;

"(2) contains the term 'classifiable';

"(3) directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;

"(4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress;

"(5) imposes any obligations or invokes any remedies inconsistent with statutory law: *Provided*, That nothing in this section shall affect the enforcement of those aspects of such nondisclosure policy, form or agreement that do not fall within subsections (1)–(5) of this section."

Section 630 applied only to fiscal year 1988; however, § 619 of the Treasury, Postal Service and General Government Appropriations Act, 1989, Pub. L. 100–440, 102 Stat. 1756, includes restrictions on expenditures of funds during fiscal year 1989 that are identical to those contained in § 630.

"be implemented and enforced in a manner consistent with" the statute of which § 630 was a part. App. 26–27. Three months after § 630 became law, the DCI replaced Form 4193 with Form 4355, which eliminated the term "classifiable." *National Federation of Federal Employees* v. *United States*, 688 F. Supp. 671, 680, n. 11 (DC 1988).

Appellant American Foreign Service Association (AFSA) and several Members of Congress brought the present lawsuit challenging appellees' use of Forms 189 and 4193 on the ground that they violated § 630. They sought declaratory and injunctive relief that would (1) bar appellees from requiring employees to execute or sign Form 4193 during fiscal year 1988; (2) compel appellees to treat any Form 4193 agreement signed after December 22, 1987 (the effective date of § 630), as void; and (3) direct appellees to notify all employees who signed Form 189 or 4193 after December 22, 1987, that these agreements were void and that the terms of such forms signed before that date could not be enforced in fiscal year 1988. App. 10. This lawsuit was consolidated with two other cases, brought by the National Federation of Federal Employees and the American Federation of Government Employees, which sought to enjoin the use of Forms 189 and 4193 because, among other things, they violated § 630 and because the term "classifiable" was so vague and overbroad that it inhibited employees' speech in violation of the First Amendment.

The District Court for the District of Columbia concluded that appellant AFSA had standing to challenge the nondisclosure forms on behalf of its members, but that the Members of Congress lacked standing to challenge the use of the forms. 688 F. Supp., at 678–682. The court then *assumed* that "the Executive's actions since enactment of section 630 do not comply with the requirements of that legislation," *id.*, at 683, and n. 16, because the DCI had continued to require employees to sign Form 4193 for three months after enactment of § 630 despite § 630's specific prohibition on the use of that form. Acknowledging that, during that time, the DCI had added a paragraph to Form 4193 stating that the agreement would be enforced in a manner consistent with § 630, the District Court nevertheless concluded that this action was not "'true to the congressional mandate from which it derives authority,'" *id.*, at 683–684, n. 16, quoting *Farmers Union Central Exchange, Inc.* v. *FERC*, 236 U. S. App. D. C. 203, 217, 734 F. 2d 1486, 1500 (1984), and that review of the Executive's action under the Administrative Procedure Act, 5 U. S. C. § 706, "likely" would show that the Executive's action was contrary to law, 688 F. Supp., at 684, n. 16. Having thus skirted the statutory question whether the Executive Branch's implementation of Forms 189 and 4193 violated § 630, the court proceeded to address appellees' argument that the lawsuit should be dismissed because § 630 was an unconstitutional interference with the President's authority to protect the national security. Concluding that § 630 "impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations," *id.*, at 685, the court entered summary judgment in favor of appellees.

Appellants took a direct appeal from the District Court's judgment pursuant to 28 U. S. C. § 1252, and we noted probable jurisdiction, 488 U. S. 923 (1988). In spite of the importance of the constitutional question whether § 630 impermissibly intrudes upon the Executive's authority to regulate the disclosure of national security information—indeed, partly because of it—we remand this case to the District Court without expressing an opinion on that issue.

Events occurring since the District Court issued its ruling place this case in a light far different from the one in which that court considered it. Since issuing the decision that we now review, the District Court has ruled on the constitutional challenge presented by the cases with which the present one was consolidated, and has decided that the unadorned term "classifiable" used in Forms 189 and 4193 is unconstitutionally vague. See *National Federation of Federal Employees* v. *United States*, 695 F. Supp. 1196, 1201–1203 (DC 1988). The court further held that the DISOO's definition of the term "classifiable," see *supra*, at 155, would remedy this vagueness, and ordered appellees to notify employees either that this definition was in force or that no penalties would be imposed for the disclosure of "classifiable" information. 695 F. Supp., at 1203–1204. Appellees thereafter deleted the word "classifiable"—a primary focus of appellants' challenge to Forms 189 and 4193—from all nondisclosure forms, and replaced it with the definition given in the DISOO's regulation. They also furnished individualized notice of this change to employees who signed either Form 189 or Form 4193. 53 Fed. Reg. 38278 (1988); Motion to Affirm 13. According to appellants, however, appellees have notified only current employees of the refinement of the term "classifiable"; former employees, who signed Form 189 or 4193 but have left the employment of the Federal Government, have not received such notice. Brief for Appellants 15. The controversy as it exists today is, in short, quite different from the one that the District Court considered.

Indeed, appellees urge us to hold the case moot to the extent that it challenges the use of the term "classifiable" in Forms 189 and 4193. Brief for Appellees 31–32. As to current employees who have been notified that the term "classifiable" no longer controls their disclosure of information, the controversy is indeed moot. Appellants emphasize, however, that former employees have not been informed of the switch in terminology; as to them, the controversy whether they should have received notice of this change remains alive. Brief for Appellants 20. We decline to decide the merits of appellants' request for individualized notice to these employees, however, because the questions whether individual notice is required by § 630 and whether appellants' complaint can be read to request such notice for *former* employees, see

Brief for Appellees 32, n. 24 (arguing that it cannot be so read), are questions best addressed in the first instance by the District Court.

A second reason why we remand this case for further proceedings rather than ordering it dismissed is that appellants argue that the definition of "classified information" now supplied by the DISOO, 53 Fed. Reg. 38279 (1988) (to be codified in 32 CFR § 2003.20(h)(3)), does not comply with § 630. They contend that the DISOO's definition prohibits disclosure of information that an employee reasonably should have known was classified, whereas subsection (1) of § 630 refers only to information that is "known by the employee" to be classified or in the process of being classified. Brief for Appellants 19–20. In contrast, appellees and the Senate as *amicus* argue that there is no inconsistency between § 630(1) and this new definition. Brief for Appellees 39–41; Brief for United States Senate as *Amicus Curiae* 17–18. It appears that, in order to press this issue, appellants would be forced to amend their complaint in order to take into account the new definition of the term "classified." Brief for Appellees 41. Because the decision whether to allow this amendment is one for the District Court, and because appellants' argument raises a question of statutory interpretation not touched upon by the District Court, we leave these matters for that court to decide in the first instance.

In addition, there remains a question whether the forms comply with subsections (3), (4), and (5) of § 630, dealing with disclosure of classified information to Congress. Both appellants and appellees apparently agree that these subsections simply preserve pre-existing rights, rights guaranteed by other statutes and constitutional provisions. Brief for Appellants 38–40; Brief for Appellees 48. The only relief appellants request with respect to this portion of the case is notice to employees informing them that Forms 189 and 4193 did not alter those pre-existing rights. Brief for Appellants 38. No actual instance in which an employee sought to disclose information to Congress, and was prohibited from doing so, has been brought to our attention. There thus exists a substantial possibility that this last portion of the case is not ripe for decision, and this is exactly the argument pressed by several *amici.* Brief for American Civil Liberties Union as *Amicus Curiae* 28–48; Brief for Speaker and Leadership Group of House of Representatives as *Amicus Curiae* 12–16; Brief for United States Senate as *Amicus Curiae* 15–21. We are not, however, disposed to decide for ourselves whether this is so. Since the District Court analyzed the interaction between § 630 and the Executive Branch's nondisclosure policy only in abbreviated fashion, we do not have the benefit of a lower court's interpretation of the statute and of Executive policy to help us decide whether the case is ready for decision or, if it is, to guide our own resolution of the merits. Again, therefore, we return these questions to the District Court to allow it to sort them out in the first instance.

Because part of the controversy has become moot but other parts of it may retain vitality, we vacate the judgment below and remand for further proceedings consistent with this opinion. See, *e. g., United States Dept. of Treasury* v. *Galioto,* 477 U. S. 556, 560 (1986); *United States* v. *Munsingwear, Inc.,* 340 U. S. 36, 39–40 (1950). In doing so, we emphasize that the District Court should not pronounce upon the relative constitutional authority of Congress and the Executive Branch unless it finds it imperative to do so. Particularly where, as here, a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional rulings. On remand, the District Court should decide first whether the controversy is sufficiently live and concrete to be adjudicated and whether it is an appropriate case for equitable relief, and then decide whether the statute and forms are susceptible of a reconciling interpretation; if they are not, the court may turn to the constitutional question whether § 630 impermissibly intrudes upon the Executive Branch's authority over national security information. See, *e. g.*, *Ashwander* v. *TVA*, 297 U. S. 288, 345–356 (1936) (Brandeis, J., concurring); *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549 (1947); *Clark* v. *Jeter*, 486 U. S. 456, 459 (1988).

The judgment of the District Court for the District of Columbia is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

COTTON PETROLEUM CORP. ET AL. *v.* NEW MEXICO ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

No. 87-1327. Argued November 30, 1988—Decided April 25, 1989

Pursuant to authority granted by the Indian Mineral Leasing Act of 1938 (1938 Act), the Jicarilla Apache Tribe (Tribe) leased lands on its New Mexico reservation to appellant Cotton Petroleum Corp. (Cotton), a non-Indian company, for the production of oil and gas. Cotton's on-reservation production is subject to both a 6% tribal severance tax and appellee State's 8% severance taxes, which apply to all producers throughout the State. In 1982, Cotton paid its state taxes under protest and then brought an action in state court under, *inter alia*, the Commerce Clause of the Federal Constitution, contending that the state taxes were invalid on the basis of evidence tending to prove that the amount of such taxes imposed on reservation activity far exceeded the value of services the State provided in relation to such activity. The Tribe filed a brief *amicus curiae* arguing that a decision upholding the state taxes would substantially interfere with the Tribe's ability to raise its own tax rates and would diminish the desirability of on-reservation leases. The trial court upheld the state taxes, concluding, among other things, that the State provides substantial services to both the Tribe and Cotton, that the theory of public finance does not require that expenditures equal revenues, that the taxes' economic and legal burden falls on Cotton and has no adverse impact on tribal interests, and that the taxes are not pre-empted by federal law. The State Court of Appeals affirmed. This Court noted probable jurisdiction and invited the parties to brief and argue the additional question whether the Commerce Clause requires a tribe to be treated as a "State" for purposes of determining whether a state tax on nontribal activities conducted on a reservation must be apportioned to account for taxes the tribe imposed on the same activity.

Held: The State may validly impose severance taxes on the same on-reservation production of oil and gas by non-Indian lessees as is subject to the Tribe's own severance tax. Pp. 173–193.

(a) Under this Court's modern decisions, on-reservation oil and gas production by non-Indian lessees is subject to nondiscriminatory state taxation unless Congress has expressly or impliedly acted to pre-empt the state taxes. See, *e. g.*, *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 386–387. Pp. 173–176.

(b) The state taxes in question are not pre-empted by federal law, even when it is given the most generous construction under the relevant pre-emption test, which is flexible and sensitive to the particular facts and legislation involved and requires a particularized examination of the relevant state, federal, and tribal interests, including tribal sovereignty and independence. The 1938 Act neither expressly permits nor precludes state taxation, but simply authorizes the leasing for mining purposes of Indian lands. Moreover, that Act's legislative history sheds little light on congressional intent. The statement therein that preexisting law was inadequate to give Indians the greatest return for their property does not embody a broad congressional policy of maximizing tribes' revenues without regard to competing state interests, but simply suggests that Congress sought to remove disadvantages in mineral leasing on Indian lands that were not present with respect to public lands, which were, at the time, subject to state taxation. *Montana* v. *Blackfeet Tribe*, 471 U. S. 759, 767, n. 5, distinguished. The fact that the 1938 Act's statutory predecessor expressly waived immunity from state taxation of oil and gas lessees on reservations demonstrates that there is no history of tribal independence from such taxation, while the 1938 Act's omission of that waiver simply reflects congressional recognition that this Court's intervening decisions had repudiated the pre-existing doctrine of intergovernmental tax immunity, under which such state taxation was barred absent express congressional authorization. *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, and *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue of New Mexico*, 458 U. S. 832, are distinguished on the ground that, here, the State provides substantial services to the Tribe and Cotton that justify the tax; the tax imposes no economic burden on the Tribe; and federal and tribal regulation is not exclusive, since the State regulates the spacing and mechanical integrity of on-reservation wells. Pp. 176–187.

(c) There is no merit to Cotton's contention that the State's severance taxes—insofar as they are imposed without allocation or apportionment on top of tribal taxes—impose an unlawful multiple tax burden on interstate commerce. The fact that the State and Tribe tax the same activity is not dispositive, since each of those entities has taxing jurisdiction over the non-Indian wells by virtue of the location of Cotton's leases entirely on reservation lands within a single State. That the total tax burden on Cotton is greater than the burden on off-reservation producers is also not determinative, since neither taxing jurisdiction's tax is discriminatory, and the burdensome consequence is entirely attributable to the fact of concurrent jurisdiction. The argument that the state taxes generate revenues that far exceed the value of the State's on-reservation services is also rejected. Moreover, there is no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer—or by those living in the taxpayer's community—must equal the amount of its tax obligations. Pp. 187–191.

(d) The express language, distinct applications, and judicial interpretation of the Interstate Commerce and Indian Commerce Clauses establish that Indian tribes may not be treated as "States" for tax apportionment purposes. Pp. 191–193.

106 N. M. 517, 745 P. 2d 1170, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 193.

Daniel H. Israel argued the cause for appellants. With him on the briefs was *G. Samuel Schaunaman II.*

Hal Stratton, Attorney General of New Mexico, argued the cause for appellees. With him on the brief were *Henry M. Bohnhoff,* Deputy Attorney General, *George W. K. Snyder, Jr.,* Assistant Attorney General, and *Frank D. Katz, Daniel Yohalem,* and *Deborah A. Moll,* Special Assistant Attorneys General.*

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*Briefs of *amici curiae* urging reversal were filed for the Assiniboine and Sioux Tribes of the Fort Peck Reservation by *Harry R. Sachse* and *Donald J. Simon;* for the Blackfeet Tribe of Indians et al. by *Jeanne S. Whiteing* and *Robert S. Thompson III;* for the Council of Energy Resource Tribes et al. by *Faith R. Roessel* and *Jeanette Wolfley;* for the Jicarilla Apache Tribe by *B. Reid Haltom* and *Wayne H. Bladh;* for the Navaho Tribe of Indians by *Paull Mines* and *Michael P. Upshaw;* and for the New Mexico Oil & Gas Association by *Sarah M. Singleton* and *Edmund H. Kendrick.*

Briefs of *amici curiae* urging affirmance were filed for the State of Arizona et al. by *A. Raymond Randolph,* Special Assistant Attorney General of Utah, *Bruce R. Stewart, John K. Van de Kamp,* Attorney General of California, and *James B. Cuneo,* Deputy Attorney General, *Thomas J. Miller,* Attorney General of Iowa, *David L. Wilkinson,* Attorney General of Utah, and *Michael M. Quealy,* Assistant Attorney General, *Robert K. Corbin,* Attorney General of Arizona, and *Anthony B. Ching,* Solicitor General, *Duane Woodward,* Attorney General of Colorado, *Robert A. Butterworth,* Attor-

JUSTICE STEVENS delivered the opinion of the Court.

This case is a sequel to *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130 (1982), in which we held that the Jicarilla Apache Tribe (Tribe) has the power to impose a severance tax on the production of oil and gas by non-Indian lessees of wells located on the Tribe's reservation. We must now decide whether the State of New Mexico can continue to impose its severance taxes on the same production of oil and gas.

I

All 742,135 acres of the Jicarilla Apache Reservation are located in northwestern New Mexico. *Id.*, at 133. In 1887, President Cleveland issued an Executive Order setting aside this tract of public land "as a reservation for the use and occupation of the Jicarilla Apache Indians." 1 C. Kappler, Indian Affairs, Laws and Treaties 875 (1904). The only qualification contained in the order was a proviso protecting bona fide settlers from defeasance of previously acquired federal rights.[1]

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ney General of Florida, *Michael T. Greely*, Attorney General of Montana, *Robert H. Henry*, Attorney General of Oklahoma, *Kenneth O. Eikenberry*, Attorney General of Washington, *Joseph B. Meyer*, Attorney General of Wyoming, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Roger A. Tellinghuisen*, Attorney General of South Dakota, and *Donald J. Hanaway*, Attorney General of Wisconsin; and for San Juan County et al. by *Lyle Robert Anderson*.

Briefs of *amici curiae* were filed for Texaco Inc. et al. by *Bruce Douglas Black* and *Alan L. Sullivan;* for the Southern Ute Indian Tribe by *Frank E. Maynes;* and for the Crow Tribe et al. by *Catherine Baker Stetson*.

[1] The full text of the Executive Order reads as follows:

"EXECUTIVE MANSION, February 11, 1887

"It is hereby ordered that all that portion of the public domain in the Territory of New Mexico which, when surveyed, will be embraced in the following townships, viz:

"27, 28, 29, and 30 north, ranges 1 east, and 1, 2, 3 west; 31 and 32 north, ranges 2 west and 3 west, and the south half of the township 31 north, range 1 west, be, and the same is hereby, set apart as a reservation for the use and occupation of the Jicarilla Apache Indians: *Provided*, That this order shall not be so construed as to deprive any bona fide settler of any

Ibid. The land is still owned by the United States and is held in trust for the Tribe.

The Tribe, which consists of approximately 2,500 enrolled members, is organized under the Indian Reorganization Act. 48 Stat. 984, 25 U. S. C. § 461 *et seq.* The Indian Mineral Leasing Act of 1938 (1938 Act) grants the Tribe authority, subject to the approval of the Secretary of the Interior (Secretary), to execute mineral leases. 52 Stat. 347, 25 U. S. C. § 396a *et seq.* Since at least as early as 1953, the Tribe has been leasing reservation lands to nonmembers for the production of oil and gas. See *Merrion, supra,* at 135. Mineral leases now encompass a substantial portion of the reservation and constitute the primary source of the Tribe's general operating revenues. In 1969, the Secretary approved an amendment to the Tribe's Constitution authorizing it to enact ordinances, subject to his approval, imposing taxes on nonmembers doing business in the reservation. See Revised Constitution of the Jicarilla Apache Tribe, Art. XI, § 1(e) (Equity). The Tribe enacted such an ordinance in 1976, imposing a severance tax on "any oil and natural gas severed, saved and removed from Tribal lands." Oil and Gas Severance Tax, Ordinance No. 77–0–02, Jicarilla Apache Tribal Code (hereinafter J. A. T. C.), Tit. 11, ch. 1 (1987) (Equity); see also *Merrion, supra,* at 135–136. The Secretary approved the ordinance later that year, and in 1982 this Court upheld the Tribe's power to impose a severance tax on pre-existing as well as future leases. See *Merrion, supra.* Subsequently, the Tribe enacted a privilege tax, which the

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valid rights he may have acquired under the law of the United States providing for the disposition of the public domain.

"GROVER CLEVELAND"

1 Kappler, at 875.

The boundaries of the reservation were further defined in subsequent Executive Orders. See 3 *id.,* at 681–682, 684–685 (Executive Orders of Presidents Roosevelt and Taft); see also *Merrion* v. *Jicarilla Apache Tribe,* 455 U. S. 130, 133–134, n. 1 (1982).

Secretary also approved. See Oil and Gas Privilege Tax, Ordinance No. 85-0-434, J. A. T. C., Tit. 11, ch. 2 (1985).[2]

In 1976, Cotton Petroleum Corporation (Cotton), a non-Indian company in the business of extracting and marketing oil and gas, acquired five leases covering approximately 15,000 acres of the reservation. There were then 15 operating wells on the leased acreage and Cotton has since drilled another 50 wells. The leases were issued by the Tribe and the United States under the authority of the 1938 Act. Pursuant to the terms of the leases, Cotton pays the Tribe a rent of $125 per acre, plus a royalty of 12½ percent of the value of its production.[3] In addition, Cotton pays the Tribe's oil and gas severance and privilege taxes, which amount to approximately 6 percent of the value of its production. Thus, Cotton's aggregate payment to the Tribe includes an acreage rent in excess of $1 million, plus royalties and taxes amounting to about 18½ percent of its production.

Prior to 1982, Cotton paid, without objection, five different oil and gas production taxes to the State of New Mexico.[4] The state taxes amount to about 8 percent of the value of Cotton's production. The same 8 percent is collected from producers throughout the State. Thus, on wells outside the reservation, the total tax burden is only 8 percent, while Cotton's reservation wells are taxed at a total rate of 14 percent (8 percent by the State and 6 percent by the Tribe). No state tax is imposed on the royalties received by the Tribe.

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[2] Effective January 1, 1988, the Tribe added a third tax, which is based on the value of possessory interests—including leasehold interests—held by taxpayers on the reservation. See Possessory Interest Tax, Ordinance No. 88-R-152, reprinted in App. to Reply Brief for Appellants 4-19 (filed Mar. 16, 1988). Because Cotton does not seek refund of state taxes paid after the possessory interest tax took effect, and because this tax was not enacted until after the New Mexico Court of Appeals issued its decision, we leave it to the side for purposes of our decision.

[3] Cotton also pays an overriding royalty of 12½ percent of the value of production to the assignors of the five leases. See 106 N. M. 517, 518, 745 P. 2d 1170, 1171 (1987).

[4] The five taxes are the Oil and Gas Severance Tax, N. M. Stat. Ann. § 7-29-1 (1986); the Oil and Gas Conservation Tax, § 7-30-1; the Oil and Gas Emergency School Tax, § 7-31-1; the Oil and Gas Ad Valorem Production Tax, § 7-32-1; and the Production Equipment Ad Valorem Tax, § 7-34-1.

At the end of our opinion in *Merrion*, 455 U. S., at 158–159, n. 26, we added a footnote rejecting the taxpayer's argument that the tribal tax was invalid as a "multiple tax burden on interstate commerce" because imposed on the same activity already taxed by the State. One of the reasons the argument failed was that the taxpayer had made no attempt to show that the Tribe was "seek[ing] to seize more tax revenues than would be fairly related to the services provided by the Tribe." *Ibid.* After making that point, the footnote suggested that the state tax might be invalid under the Commerce Clause if in excess of what "the *State's* contact with the activity would justify."[5] *Ibid.* (emphasis in original).

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[5] The entire footnote reads as follows:

"[26] Petitioners contend that because New Mexico may tax the same mining activity at full value, the Indian tax imposes a multiple tax burden on interstate commerce in violation of the Commerce Clause. The multiple taxation issue arises where two or more taxing jurisdictions point to some contact with an enterprise to support a tax on the entire value of its multistate activities, which is more than the contact would justify. *E. g.*, *Standard Oil Co.* v. *Peck*, 342 U. S. 382, 384–385 (1952). This Court has required an apportionment of the tax based on the portion of the activity properly viewed as occurring within each relevant State. See, *e. g.*, *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, 219 (1980); *Washington Revenue Dept.* v. *Association of Washington Stevedoring Cos.*, 435 U. S. 734, 746, and n. 16 (1978).

"This rule has no bearing here, however, for there can be no claim that the Tribe seeks to tax any more of petitioners' mining activity than the portion occurring within tribal jurisdiction. Indeed, petitioners do not even argue that the Tribe is seeking to seize more tax revenues than would be fairly related to the services provided by the Tribe. . . . In the absence of such an assertion, and when the activity taxed by the Tribe occurs entirely on tribal lands, the multiple taxation issue would arise only if a *State* attempted to levy a tax on the same activity, which is more than the *State's* contact with the activity would justify. In such a circumstance, any chal-

In 1982, Cotton paid its state taxes under protest and then brought an action in the District Court for Santa Fe County challenging the taxes under the Indian Commerce, Interstate Commerce, Due Process, and Supremacy Clauses of the Federal Constitution. App. 2–15. Relying on the *Merrion* footnote, Cotton contended that state taxes imposed on reservation activity are only valid if related to actual expenditures by the State in relation to the activity being taxed. Record 421. In support of this theory, Cotton presented evidence at trial tending to prove that the amount of tax it paid to the State far exceeded the value of services that the State provided to it and that the taxes paid by all nonmember oil producers far exceeded the value of services provided to the reservation as a whole.[6] Cotton did not, however, attempt to prove that the state taxes imposed any burden on the Tribe.

After trial, the Tribe sought, and was granted, leave to file a brief *amicus curiae*. *Id.*, at 128. The Tribe argued that a decision upholding the state taxes would substantially interfere with the Tribe's ability to raise its own tax rates and would diminish the desirability of on-reservation oil and gas leases. *Id.*, at 124. The Tribe expressed a particular concern about what it characterized as a failure of the State "to provide services commensurate with the taxes collected." *Ibid.*

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lenge asserting that tribal and state taxes create a multiple burden on interstate commerce should be directed at the state tax, which, in the absence of congressional ratification, might be invalidated under the Commerce Clause. These cases, of course, do not involve a challenge to state taxation, and we intimate no opinion on the possibility of such a challenge." 455 U. S., at 158–159 (emphasis in original).

[6] Cotton's evidence tended to prove that for the tax years 1981–1985 it paid New Mexico $2,293,953, while only receiving the equivalent of $89,384 in services to its operations in return. See 106 N. M., at 520, 745 P. 2d, at 1173. Cotton's evidence further suggested that over the same period the State received total tax revenues of $47,483,306 from the on-reservation, nonmember oil and gas producers, while only providing $10,704,748 in services to the reservation as a whole. See *ibid.*

After the Tribe filed its brief, the New Mexico District Court issued a decision upholding the state taxes. App. to Juris. Statement 14. The District Court found that "New Mexico provides substantial services to both the Jicarilla Tribe and Cotton,"[7] and concluded that the State had a valid interest in imposing taxes on non-Indians on the reservation.[8] Squarely rejecting Cotton's theory of the case, the court stated that "[t]he theory of public finance does not require expenditures equal to revenues." *Id.*, at 17. Turning to the question whether the state taxes were inconsistent with the federal interest in fostering the economic development of Indian tribes, the District Court found that the "economic and legal burden of paying the state taxes falls on Cotton or its buyers" and that "[n]o economic burden falls on the tribe by virtue of the state taxes." *Id.*, at 15. More specifically, it found that the state taxes had not affected the Tribe's ability to collect its taxes or to impose a higher tax, and had "not in any way deterred production of oil and gas" on the reservation. *Id.*, at 16–17. It concluded that the taxes had no adverse impact on tribal interests and that they were not pre-empted by federal law. *Id.*, at 17–18. Finally, the District Court held that the taxes were fully consistent with the Commerce and Due Process Clauses of the Federal Constitution. *Ibid.*

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[7] The District Court found that New Mexico spends approximately $3 million per year in providing on-reservation services to Cotton and the Tribe. App. to Juris. Statement 16. In addition, the court found that New Mexico does not discriminate against the Tribe or its members in providing state services; indeed, the State spends as much or more per capita on members of the Tribe than on nonmembers. *Ibid.* The court further found that New Mexico provides services on the reservation not provided by either the Tribal or Federal Governments, and provides additional services off the reservation that benefit the reservation and members of the Tribe. *Ibid.* Finally, the court found that the State regulates the spacing and mechanical integrity of wells located both on and off the reservation. *Ibid.*

[8] The District Court wrote:

"The state's non-discriminatory and substantial expenditures made on the Jicarilla Apache Reservation give the state a valid interest in imposing its taxes on non-Indian commercial activity on the reservation. The state need not show that every dollar of state taxes collected from the Jicarilla Reservation was spent on the reservation. The state provides the benefits of an organized and civilized society to all of its citizens, Jicarilla and non-Indian alike, and to businesses, including Cotton, extracting oil and gas in the state." *Id.*, at 19.

The New Mexico Court of Appeals affirmed. 106 N. M. 517, 745 P. 2d 1170 (1987). Like the District Court, it was left unpersuaded by Cotton's contention that the New Mexico taxes are invalid because the State's expenditures on reservation activity do not equal the revenues collected. The Court of Appeals correctly noted that the *Merrion* footnote, 455 U. S., at 159, n. 26, "intimate[s] no opinion on the possibility of such a challenge," but simply suggests that a state tax "might" be invalid if greater than the State's "contact with the [on-reservation] activity would justify." 106 N. M., at 520, 745 P. 2d, at 1173. Finding no support for Cotton's position in *Merrion*, the Court of Appeals looked instead to our opinion in *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609 (1981), and concluded that a State's power to tax an activity connected to interstate commerce is not limited to the value of the services provided in support of that activity. 106 N. M., at 521, 745 P. 2d, at 1174. Agreeing with the trial court that the New Mexico taxes were fairly related to the services provided to Cotton, the Court of Appeals rejected Cotton's Commerce Clause challenge. *Ibid.*

The Tribe, again participating as an *amicus curiae*, urged a different approach to the case. Unlike Cotton, the Tribe argued that the state taxes could not withstand traditional pre-emption analysis. The Tribe conceded that state laws, to the extent they do not interfere with tribal self-government, may control the conduct of non-Indians on the reservation. It maintained, however, that the taxes at issue interfered with its ability to raise taxes and thus with its right to self-government. The Court of Appeals rejected this argument because the record contained no evidence of any adverse impact on the Tribe and, indeed, indicated that the Tribe could impose even higher taxes than it had without adverse effect.[9]

The New Mexico Supreme Court granted, but then quashed, a writ of certiorari. 106 N. M. 511, 745 P. 2d 1159 (1987). We then noted probable jurisdiction and invited the parties to brief and argue the following additional question:

> "Does the Commerce Clause require that an Indian Tribe be treated as a State for purposes of determining whether a state tax on nontribal activities conducted on an Indian Reservation must be apportioned to account for taxes imposed on those same activities by the Indian Tribe?" 485 U. S. 1005 (1988).

We now affirm the judgment of the New Mexico Court of Appeals.

II

This Court's approach to the question whether a State may tax on-reservation oil production by non-Indian lessees has varied over the course of the past century. At one time, such a tax was held invalid unless expressly authorized by Congress; more recently, such taxes have been upheld unless expressly or impliedly prohibited by Congress. The changed approach to these taxes is one aspect of the evolution of the doctrine of intergovernmental tax immunity that we recently discussed in detail in *South Carolina* v. *Baker*, 485 U. S. 505 (1988).

During the first third of this century, this Court frequently invalidated state taxes that arguably imposed an indirect economic burden on the Federal Government or its instrumentalities by application of the "intergovernmental immunity" doctrine. That doctrine "was based on the rationale that any tax on income a party received under a contract with the government was a tax on the contract and thus a tax 'on' the government because it burdened the government's power to enter into the contract." *Id.*, at 518. In a case decided in 1922, the Court applied the intergovernmental immunity doctrine to invalidate a state tax on income derived by a non-Indian lessee from the sale of his interest in oil produced on Indian land. See *Gillespie* v. *Oklahoma*, 257 U. S. 501. Consistently with the view of intergovernmental immunity that then prevailed, the Court stated that "a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards." *Id.*, at 506 (citing *Weston* v. *Charleston*, 2 Pet. 449, 468 (1829)). The same reasoning was used to invalidate a variety of other state taxes imposed on non-Indian lessees at that time.[10]

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[9] The Court of Appeals noted that Cotton, and not the Tribe, paid the taxes at issue; that "[t]he record contains no evidence of an impact [on] tribal sovereignty"; that Cotton drilled 12 new wells while subject to both the state and tribal taxes and "shows no signs of disrupting production because of the tax burden"; and that at trial "[t]he Tribe's own consultant indicated that the Tribe could charge an even higher tax despite the state taxes imposed on Cotton." 106 N. M., at 522, 745 P. 2d, at 1175.

Shortly after reaching its zenith in the *Gillespie* decision, the doctrine of intergovernmental tax immunity started a long path in decline and has now been "thoroughly repudiated" by modern case law. *South Carolina* v. *Baker*, *supra*, at 520. In 1932, four Members of this Court argued that *Gillespie* was unsound and should be overruled. See *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 401 (Stone, J., dissenting); *id.*, at 405 (Brandeis, J., dissenting). Five years later, the Court took a substantial step in that direction, rejecting the view that a nondiscriminatory state tax on a private party contracting with the Government is invalid because the economic burden of the tax may fall on the Government. See *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937). "With the rationale for conferring a tax immunity on parties dealing with another government rejected, the government contract immunities recognized under prior doctrine were, one by one, eliminated." *South Carolina* v. *Baker*, *supra*, at 522. Specifically, in *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 386–387 (1938), the Court squarely overruled *Gillespie*, *supra*. Thus, after *Mountain Producers Corp.*, *supra*, was decided, oil and gas lessees operating on Indian reservations were subject to nondiscriminatory state taxation as long as Congress did not act affirmatively to pre-empt the state taxes. See *ibid.* See also *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U. S. 342 (1949).

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[10] The Court held that non-Indian mineral lessees were exempt from state occupation and privilege taxes, see *Choctaw, O. & G. R. Co.* v. *Harrison*, 235 U. S. 292 (1914), exempt from state taxes on the value of their leasehold, see *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522 (1916), exempt from state gross production taxes, see *Howard* v. *Gipsy Oil Co.*, 247 U. S. 503 (1918) *(per curiam)*; *Large Oil Co.* v. *Howard*, 248 U. S. 549 (1919) *(per curiam)*, and exempt from State ad valorem taxes in some circumstances, see *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609 (1926).

In sum, it is well settled that, absent express congressional authorization, a State cannot tax the United States directly. See *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). It is also clear that the tax immunity of the United States is shared by the Indian tribes for whose benefit the United States holds reservation lands in trust. See *Montana* v. *Blackfeet Tribe*, 471 U. S. 759, 764 (1985). Under current doctrine, however, a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe. See *id.*, at 765; *South Carolina* v. *Baker*, *supra*, at 523. Although a lessee's oil production on Indian lands is therefore not "automatically exempt from state taxation," Congress does, of course, retain the power to grant such immunity. *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 150 (1973). Whether such immunity shall be granted is thus a question that "is essentially legislative in character." *Texas Co.*, *supra*, at 365–366.

The question for us to decide is whether Congress has acted to grant the Tribe such immunity, either expressly or by plain implication.[11] In addition, we must consider Cotton's argument that the "multiple burden" imposed by the state and tribal taxes is unconstitutional.

III

Although determining whether federal legislation has pre-empted state taxation of lessees of Indian land is primarily an exercise in examining congressional intent, the history of tribal sovereignty serves as a necessary "backdrop" to that process. Cf. *Rice* v. *Rehner*, 463 U. S. 713, 719 (1983) (quoting *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 172 (1973)). As a result, questions of pre-emption in this area are not resolved by reference to standards of pre-emption that have developed in other areas of the law, and are not controlled by "mechanical or absolute conceptions of state or tribal sovereignty." *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 145 (1980). Instead, we have applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. Each case "requires a particularized examination of the relevant state, federal, and tribal interests." *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue of New Mexico*, 458 U. S. 832, 838 (1982). Moreover, in examining the pre-emptive force of the relevant federal legislation, we are cognizant of both the broad policies that underlie the legislation and the history of tribal independence in the field at issue. See *ibid.* It bears emphasis that although congressional silence no longer entails a broad-based immunity from taxation for private parties doing business with Indian tribes, federal pre-emption is not limited to cases in which Congress has expressly—as compared to impliedly—pre-empted the state activity. Finally, we note that although state interests must be given weight and courts should be careful not to make legislative decisions in the absence of congressional action, ambiguities in federal law are, as a rule, resolved in favor of tribal independence. See *ibid.*

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[11] Although Cotton did not press the pre-emption argument as an independent claim before the New Mexico Court of Appeals, we conclude that the issue is properly before us. Cotton did rely on our pre-emption cases at least as a "backdrop" for its multiple taxation claim. In addition, the pre-emption claim was fully briefed before the Court of Appeals by the Tribe in its status as an *amicus curiae*. And finally, the pre-emption claim was carefully considered and passed upon by the Court of Appeals.

Against this background, Cotton argues that the New Mexico taxes are pre-empted by the "federal laws and policies which protect tribal self-government and strengthen impoverished reservation economies." Brief for Appellants 16. Most significantly, Cotton contends that the 1938 Act exhibits a strong federal interest in guaranteeing Indian tribes the maximum return on their oil and gas leases. Moreover, Cotton maintains that the Federal and Tribal Governments, acting pursuant to the 1938 Act, its accompanying regulations, and the Jicarilla Apache Tribal Code, exercise comprehensive regulatory control over Cotton's on-reservation activity. Cotton describes New Mexico's responsibilities, in contrast, as "significantly limited." Brief for Appellants 21. Thus, weighing the respective state, federal, and tribal interests, Cotton concludes that the New Mexico taxes unduly interfere with the federal interest in promoting tribal economic self-sufficiency and are not justified by an adequate state interest. We disagree.

The 1938 Act neither expressly permits state taxation nor expressly precludes it, but rather simply provides that "unallotted lands within any Indian reservation or lands owned by any tribe . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council . . . , for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities." 25 U. S. C. § 396a. The Senate and House Reports that accompanied the Act, moreover—even when considered in their broadest possible terms—shed little light on congressional intent concerning state taxation of oil and gas produced on leased lands. See S. Rep. No. 985, 75th Cong., 1st Sess. (1937); H. R. Rep. No. 1872, 75th Cong., 3d Sess. (1938). Both Reports reflect that the proposed legislation was suggested by the Secretary and considered by the appropriate committees, which recommended that it pass without amendment. Beyond this procedural summary, the Reports simply rely on the Secretary's letter of transmittal to describe the purpose of the Act. That letter provides that the legislation was intended, in light of the disarray of federal law in the area, "to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes," and, in particular, was designed to "bring all mineral leasing matters in harmony with the Indian Reorganization Act." *Id.*, at 1, 3; S. Rep. No. 985, *supra*, at 2, 3. In addition, the letter contains the following passage:

> "*It is not believed that the present law is adequate to give the Indians the greatest return from their property.* As stated, present law provides for locating and taking mineral leases in the same manner as mining locations are made on the public lands of the United States; but there are disadvantages in following this procedure on Indian lands that are not present in applying for a claim on the public domain. For instance, on the public domain the discoverer of a mineral deposit gets extralateral rights and can follow the ore beyond the side lines indefinitely, while on the Indian lands under the act of June 30, 1919, he is limited to the confines of the survey markers not to exceed 600 feet by 1,500 feet in any one claim. The draft of the bill herewith would permit the obtaining of sufficient acreage to remove the necessity for extralateral rights with all of its attending controversies." *Id.*, at 2; H. R. Rep. No. 1872, *supra*, at 2 (emphasis added).

Relying on the first sentence in this paragraph, Cotton argues that the 1938 Act embodies a broad congressional policy of maximizing revenues for Indian tribes. Cotton finds support for this proposition in *Montana* v. *Blackfeet Tribe*, 471 U. S. 759 (1985). That case raised the question whether the 1938 Act authorizes state taxation of a tribe's royalty interests under oil and gas leases issued to nonmembers. Applying the settled rule that a tribe may only be directly taxed by a State if "Congress has made its intention to [lift the tribe's exemption] unmistakably clear," *id.*, at 765, we concluded that "the State may not tax Indian royalty income from leases issued pursuant to the 1938 Act," *id.*, at 768. In a footnote we added the observation that direct state taxation of Indian revenues would frustrate the 1938 Act's purpose of "ensur[ing] that Indians receive 'the greatest return from their property,' [S. Rep. No. 985, *supra*, at] 2; H. R. Rep. No. 1872, *supra*, at 2." *Id.*, at 767, n. 5.

To the extent Cotton seeks to give the Secretary's reference to "the greatest return from their property" talismanic effect, arguing that these words demonstrate that Congress intended to guarantee Indian tribes the maximum profit available without regard to competing state interests, it overstates its case. There is nothing remarkable in the proposition that, in authorizing mineral leases, Congress sought to provide Indian tribes with a profitable source of revenue. It is however quite remarkable, indeed unfathomable in our view, to suggest that Congress intended to remove all state-imposed obstacles to profitability by attaching to the Senate and House Reports a letter from the Secretary that happened to include the phrase "the greatest return from their property." Read in the broadest terms possible, the relevant paragraph suggests that Congress sought to remove "disadvantages in [leasing mineral rights] on Indian lands that are not present in applying for a claim on the public domain." S. Rep. No. 985, *supra*, at 2; H. R. Rep. No. 1872, *supra*, at 2. By 1938, however, it was established that oil and gas lessees of public lands were subject to state taxation. See *Mid-Northern Oil Co.* v. *Walker*, 268 U. S. 45 (1925). It is thus apparent that Congress was not concerned with state taxation, but with matters such as the unavailability of extralateral mineral rights on Indian land. Nor do we read the *Blackfeet* footnote, 471 U. S., at 767, n. 5, to give the Secretary's words greater effect. We think it clear that the footnote simply stands for the proposition that the Act's purpose of creating a source of revenue for Indian tribes provides evidence that Congress did not intend to authorize direct state taxation of Indian royalties.

We thus agree that a purpose of the 1938 Act is to provide Indian tribes with badly needed revenue, but find no evidence for the further supposition that Congress intended to remove all barriers to profit maximization. The Secretary's letter of transmittal, even when read permissively for broad policy goals and even when read to resolve ambiguities in favor of tribal independence, supports no more.

Our review of the legislation that preceded the 1938 Act provides no additional support for Cotton's expansive view of the Act's purpose. This history is relevant in that it supplies both the legislative background against which Congress enacted the 1938 Act and the relevant "backdrop" of tribal independence. Congress first authorized mineral leasing on Indian lands in 1891. See Act of Feb. 28, 1891, § 3, 26 Stat. 795, 25 U. S. C. § 397 (1891 Act). That legislation, which empowered tribes to enter into grazing and mining leases, only applied to lands "occupied by Indians who have bought and paid for the same," and was thus interpreted to be inapplicable to Executive Order reservations. See *British-American Oil Producing Co.* v. *Board of Equalization of Montana*, 299 U. S. 159, 161–162, 164 (1936). Mineral leasing on reservations created by Executive Order—like the Jicarilla Apache Reservation—was not authorized until almost four decades later. After years of debate concerning whether Indians had any right to share in royalties derived from oil and gas leases in Executive Order reservations,[12]

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[12] This history is recounted in L. Kelly, The Navajo Indians and Federal Indian Policy 48–103 (1968) (hereinafter Kelly).

Of particular significance, in 1922, the Secretary took the position that Executive Order reservations "are without question lands 'owned by the

Congress finally enacted legislation in 1927 that authorized such leases. See Indian Oil Act of 1927, 44 Stat. (part 2) 1347, 25 U. S. C. § 398a (1927 Act).

While both the 1891 and 1927 Acts were in effect, *Gillespie* was the prevailing law and, under its expansive view of intergovernmental tax immunity, States were powerless to impose severance taxes on oil produced on Indian reservations unless Congress expressly waived that immunity. Just two years after *Gillespie* was decided, Congress took such express action and authorized state taxation of oil and gas production in treaty reservations. See Indian Oil Leasing Act of 1924, 43 Stat. 244 (1924 Act), current version at 25 U. S. C. § 398. See also *British-American Oil Producing Co.* v. *Board of Equalization, supra* (applying 1924 Act to uphold state tax imposed on the production of oil and gas in

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United States,'" and thus subject to leasing under the Mineral Lands Leasing Act of 1920, 41 Stat. 450, 30 U. S. C. § 189. *Harrison*, 49 L. D. 139, 144. As such, the Executive Order tribes had no right to share in royalties derived from oil and gas leases. Two years later, then-Attorney General Stone rendered an opinion concluding that the Mineral Lands Leasing Act did not apply to Executive Order reservations. 34 Op. Atty. Gen. 171, 181. This decision made clear that new federal legislation would be required to open Executive Order reservations to oil and gas leasing. For the next few years, a number of legislative solutions were proposed and considered. For example, in 1926, Representative Carl Hayden introduced legislation that would have provided for Executive Order reservation leasing in accordance with the Indian Oil Leasing Act of 1924, 43 Stat. 244, but which, in lieu of permitting a state production tax, would have given to the relevant State 37½ percent of the royalties, rent, and bonuses received by the tribe. See Kelly 78. This payment was to be used for building and maintaining roads on the reservation or to support public schools attended by Indian children. See *id.*, at 79. A bill introduced in the Senate would have attached no qualification to how the State might spend its 37½ percent share. See *id.*, at 88–89. Finally, Congress settled on the terms of the Indian Oil Act of 1927, which authorized oil and gas leasing in Executive Order reservations and allowed States to tax "any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected." 44 Stat. (part 2) 1347, 25 U. S. C. § 398c.

the Blackfeet Indian Reservation). More significantly for purposes of this case, when Congress first authorized oil and gas leasing on Executive Order reservations in the 1927 Act, it expressly waived immunity from state taxation of oil and gas lessees operating in those reservations. See 44 Stat. (part 2) 1347, 25 U. S. C. § 398c. Thus, at least as to Executive Order reservations, state taxation of nonmember oil and gas lessees was the norm from the very start. There is, accordingly, simply no history of tribal independence from state taxation of these lessees to form a "backdrop" against which the 1938 Act must be read.

We are also unconvinced that the contrast between the 1927 Act's express waiver of immunity and the 1938 Act's silence on the subject suggests that Congress intended to repeal the waiver in the 1938 Act and thus to diametrically change course by implicitly barring state taxation. The general repealer clause contained in the 1938 Act provides that "[a]ll Act[s] or parts of Acts inconsistent herewith are hereby repealed." 52 Stat. 348. Although one might infer from this clause that all preceding, *non*conflicting legislation in the area, like the 1927 Act's waiver provision, is implicitly incorporated, we need not go so far to simply conclude that the 1938 Act's omission demonstrates no congressional purpose to close the door to state taxation. Moreover, the contrast between the 1927 and 1938 Acts is easily explained by the contemporaneous history of the doctrine of intergovernmental tax immunity. In 1927, *Gillespie* prevailed, and States were only permitted to tax lessees of Indian lands if Congress expressly so provided. By the time the 1938 Act was enacted, however, *Gillespie* had been overruled and replaced by the modern rule permitting such taxes absent congressional disapproval.[13] Thus, Congress' approaches to both the

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[13] Although *Gillespie* was not explicitly overruled until 1938 in *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, the holding in that case was plainly foreshadowed by the development of the law in this area during the preceding decade. See *supra*, at 174–175. The fact that the text of the

1927 and 1938 Acts were fully consistent with an intent to permit state taxation of nonmember lessees.[14]

Cotton nonetheless maintains that our decisions in *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136 (1980), and *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue of*

1938 Act had been drafted before our decision in *Mountain Producers* was actually handed down does not, therefore, have the significance that the dissent ascribes to it. See *post*, at 197–198.

[14] Our decision in *Montana* v. *Blackfeet Tribe*, 471 U. S. 759 (1985), is not to the contrary. In that case we considered the distinct question whether the 1938 Act, through incorporation of the 1927 Act, expressly authorized direct taxation of Indian royalties. In concluding that it did not, we made clear that our holding turned on the rule that Indian tribes, like the Federal Government itself, are exempt from direct state taxation and that this exemption is "lifted only when Congress has made its intention to do so unmistakably clear." *Id.*, at 765. We stressed that the 1938 Act "contains no explicit consent to state taxation," and that the reverse implication of the general repealer clause that the 1927 waiver might be incorporated "does not satisfy the requirement that Congress clearly consent to state taxation." *Id.*, at 766–767. Our conclusion that the 1938 Act does not expressly authorize direct taxation of Indian tribes does not entail the further step that the Act impliedly prohibits taxation of nonmembers doing business on a reservation.

Nor can a congressional intent to pre-empt state taxation be found in the Indian Reorganization Act, 48 Stat. 984, 25 U. S. C. 461 *et seq.*, the Indian Financing Act of 1974, 88 Stat. 77, 25 U. S. C. § 1451 *et seq.*, or the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U. S. C. § 450 *et seq.* Although these statutes "evidence to varying degrees a congressional concern with fostering tribal self-government and economic development," *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 155 (1980), they no more express a congressional intent to pre-empt state taxation of oil and gas lessees than does the 1938 Act. More instructive is the Crude Oil Windfall Profit Tax Act of 1980, 94 Stat. 229, 26 U. S. C. § 4986 *et seq.* In imposing the windfall profits tax, Congress expressly exempted certain Indian producers, see 26 U. S. C. § 4994(d), but decided not to exempt "oil received by non-Indian lessees of tribal interests." See S. Rep. No. 96–394, p. 61 (1979). See also H. R. Conf. Rep. No. 96–817, p. 108 (1980). If Congress was of the view that taxing non-Indian lessees would interfere with the goal of promoting tribal economic self-sufficiency, it seems unlikely that it would have imposed this additional tax on those lessees.

New Mexico, 458 U. S. 832 (1982), compel the conclusion that the New Mexico taxes are pre-empted by federal law. In pressing this argument, Cotton ignores the admonition included in both of those decisions that the relevant preemption test is a flexible one sensitive to the particular state, federal, and tribal interests involved. See *id.*, at 838; *Bracker*, *supra*, at 145.

In *Bracker*, we addressed the question whether Arizona could impose its motor carrier license and use fuel taxes on a nonmember logging company's use of roads located solely within an Indian reservation. Significantly, the roads at issue were "built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors," 448 U. S., at 150, and the State was "unable to identify any regulatory function or service [it] performed . . . that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation," *id.*, at 148–149. See also *id.*, at 174 (Powell, J., concurring) ("The State has no interest in raising revenues from the use of Indian roads that cost it nothing and over which it exercises no control"). Moreover, it was undisputed in *Bracker* that the economic burden of the taxes ultimately fell on the Tribe. *Id.*, at 151. Based on these facts and on our conclusion that collection of the taxes would undermine federal policy "in a context in which the Federal Government has undertaken to regulate the most minute details" of the Tribe's timber operations, we held that the taxes were pre-empted. *Id.*, at 149.

Ramah Navajo School Bd. involved a similar factual scenario. In the late 1960's, New Mexico closed the only public high school that served the Ramah Navajo children. The State then sought to tax two nonmember construction firms hired by the Tribe to build a school in the reservation. As in *Bracker*, the State asserted no legitimate regulatory interest that might justify the tax. *Ramah Navajo School Bd.*, *supra*, at 843–846. Also as in *Bracker*, the economic burden of the tax ultimately fell on the Tribe. And finally, again as in *Bracker*, we noted that federal law imposed a comprehensive regulatory scheme. *Ramah Navajo School Bd.*, 458 U. S., at 839–842. We concluded: "Having declined to take any responsibility for the education of these Indian children, the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education—a scheme which has 'left the State with no duties or responsibilities.'" *Id.*, at 843 (quoting *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685, 691 (1965)).

The factual findings of the New Mexico District Court clearly distinguish this case from both *Bracker*, *supra*, and *Ramah Navajo School Bd.*, *supra*. After conducting a trial, that court found that "New Mexico provides substantial services to both the Jicarilla Tribe and Cotton," costing the State approximately $3 million per year. App. to Juris. Statement 16. Indeed, Cotton concedes that from 1981 through 1985 New Mexico provided its operations with services costing $89,384, but argues that the cost of these services is disproportionate to the $2,293,953 in taxes the State collected from Cotton. Brief for Appellants 13–14. Neither *Bracker*, nor *Ramah Navajo School Bd.*, however, imposes such a proportionality requirement on the States.[15] Rather, both cases involved complete abdication or noninvolvement of the State in the on-reservation activity. The present case is also unlike *Bracker* and *Ramah Navajo School Bd.*, in that the District Court found that "[n]o economic burden falls on the tribe by virtue of the state taxes," App. to Juris. Statement 15, and that the Tribe could, in fact, increase its taxes without adversely affecting on-reservation oil and gas development, *id.*, at 17. Finally, the District Court found that the

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[15] Nor are we inclined to do so today. Not only would such a proportionality requirement create nightmarish administrative burdens, but it would also be antithetical to the traditional notion that taxation is not premised on a strict *quid pro quo* relationship between the taxpayer and the tax collector. See *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 521–523 (1937).

State regulates the spacing and mechanical integrity of wells located on the reservation. *Id.*, at 16. Thus, although the federal and tribal regulations in this case are extensive,[16] they are not exclusive, as were the regulations in *Bracker* and *Ramah Navajo School Bd.*

We thus conclude that federal law, even when given the most generous construction, does not pre-empt New Mexico's oil and gas severance taxes. This is not a case in which the State has had nothing to do with the on-reservation activity, save tax it. Nor is this a case in which an unusually large state tax has imposed a substantial burden on the Tribe.[17] It is, of course, reasonable to infer that the New

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[16] The federal regulations provide, *inter alia*, that tribal leases may only be offered for sale pursuant to specified standards governing notice and bidding, 25 CFR § 211.3(a) (1988), that the Secretary reserves "the right to reject all bids when in his judgment the interests of the Indians will be best served by so doing," § 211.3(b), that corporate bidders must submit detailed information concerning their officers, directors, shareholders, and finances, § 211.5, that no single lease for oil and gas may exceed 2,560 acres, § 211.9, and that a primary lease may not exceed 10 years, § 211.10. The regulations also address the manner of payment and amount of rents and royalties, §§ 211.12, 211.13(a), and provide for Interior Department inspection of lessees' premises and records, § 211.18. Other federal regulations address the spacing, drilling, and plugging of wells and impose reporting requirements concerning production and environmental protection. See 43 CFR §§ 3160.0–1—3186.4 (1987).

The Tribe imposes further regulations, including a requirement that anyone seeking to conduct oil and gas operations in the reservation must obtain a permit from the Tribal Oil and Gas Administration, J. A. T. C., Tit. 18, ch. 1, § 3, must post a bond, § 4(B), must open covered premises for inspection, § 5(C)(2), and must comply with the Tribe's environmental protection ordinance, § 6(A)(3).

[17] We therefore have no occasion to reexamine our summary affirmance of the Court of Appeals for the Ninth Circuit's conclusion that Montana's unique severance and gross proceeds taxes may not be imposed on coal mined on Crow tribal property. See *Montana* v. *Crow Tribe*, 484 U. S. 997 (1988), summarily aff'g 819 F. 2d 895 (1987). In that case, as the Ninth Circuit noted, the state taxes had a negative effect on the marketability of coal produced in Montana. See *id.*, at 900. Moreover, as the Solicitor General stated in urging that we affirm the judgment of the Court

Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate. Any impairment to the federal policy favoring the exploitation of on-reservation oil and gas resources by Indian tribes that might be caused by these effects, however, is simply too indirect and too insubstantial to support Cotton's claim of pre-emption. To find pre-emption of state taxation in such indirect burdens on this broad congressional purpose, absent some special factor such as those present in *Bracker* and *Ramah Navajo School Bd.*, would be to return to the pre-1937 doctrine of intergovernmental tax immunity.[18] Any adverse effect on the Tribe's finances caused by the taxation of a private party contracting with the Tribe would be ground to strike the state tax. Absent more explicit guidance from Congress, we decline to return to this long-discarded and thoroughly repudiated doctrine.

IV

Cotton also argues that New Mexico's severance taxes—"insofar as they are imposed without allocation or apportionment on top of Jicarilla Apache tribal taxes"—impose "an un-

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of Appeals, the Montana taxes at issue were "extraordinarily high." Motion to Affirm for United States, O. T. 1987, No. 87–343, p. 12. According to the Crow Tribe's expert, the combined effective rate of the Montana taxes was 32.9 percent, "more than twice that of any other state's coal taxes." 819 F. 2d, at 899, n. 2. See also JUSTICE BLACKMUN's discussion of the "enormous revenues" generated by the Montana severance tax in *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 641–642 (1981) (dissenting opinion).

[18] It is important to keep in mind that the primary burden of the state taxation falls on the non-Indian taxpayers. *Amicus curiae* briefs supporting the position of Cotton in this case have been filed by New Mexico Oil & Gas Association, Texaco Inc., Chevron U. S. A. Inc., Union Oil Company of California, Phillips Petroleum Company, Wilshire Oil Company of Texas, Exxon Corporation, Mobil Exploration and Producing North America Inc., Anadarko Petroleum Corporation, Southland Royalty Company, and Marathon Oil Company.

lawful multiple tax burden on interstate commerce." Brief for Appellants 33. In support of this argument, Cotton relies on three facts: (1) that the State and the Tribe tax the same activity; (2) that the total tax burden on Cotton is higher than the burden on its off-reservation competitors who pay no tribal tax; and (3) that the state taxes generate revenues that far exceed the value of the services it provides on the reservation.

As we pointed out in the *Merrion* footnote, see n. 5, *supra*, a multiple taxation issue may arise when more than one State attempts to tax the same activity. If a unitary business derives income from several States, each State may only tax the portion of that income that is attributable to activity within its borders.[19] See, *e. g.*, *Exxon Corp.* v. *Wisconsin Department of Revenue*, 447 U. S. 207 (1980). Thus, in such a case, an apportionment formula is necessary in order to identify the scope of the taxpayer's business that is within the taxing jurisdiction of each State. In this case, however, all of Cotton's leases are located entirely within the borders of the State of New Mexico and also within the borders of the Jicarilla Apache Reservation. Indeed, they are also within the borders of the United States. There are, therefore, three different governmental entities, each of which has taxing jurisdiction over all of the non-Indian wells. Cf. *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980) (Indian Tribe did not oust State of power to impose cigarette tax on on-reservation sales to non-Indian customers by imposing its own tax on transaction).

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[19] In *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell*, 283 U. S. 123, 134 (1931), we wrote:

"When . . . there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a State has applied a method, which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction."

The federal sovereign has the undoubted power to prohibit taxation of the Tribe's lessees by the Tribe, by the State, or by both, but since it has not exercised that power, concurrent taxing jurisdiction over all of Cotton's on-reservation leases exists. Cf. *Commonwealth Edison Co.* v. *Montana*, 453 U. S., at 617 (noting that because the taxed activity took place exclusively within Montana—although much of it on federal lands within the State—no nexus or apportionment problem existed). Unless and until Congress provides otherwise, each of the other two sovereigns has taxing jurisdiction over all of Cotton's leases.

It is, of course, true that the total taxes paid by Cotton are higher than those paid by off-reservation producers. But neither the State nor the Tribe imposes a discriminatory tax. The burdensome consequence is entirely attributable to the fact that the leases are located in an area where two governmental entities share jurisdiction. As we noted in *Merrion*, the tribal tax does "not treat minerals transported away from the reservation differently than it treats minerals that might be sold on the reservation." 455 U. S., at 157–158. Similarly, the New Mexico taxes are administered in an evenhanded manner and are imposed at a uniform rate throughout the State—both on and off the reservation. See 106 N. M., at 521, 745 P. 2d, at 1174.

Cotton's most persuasive argument is based on the evidence that tax payments by reservation lessees far exceed the value of services provided by the State to the lessees, or more generally, to the reservation as a whole. See n. 6, *supra*. There are, however, two sufficient reasons for rejecting this argument. First, the relevant services provided by the State include those that are available to the lessees and the members of the Tribe off the reservation as well as on it. The intangible value of citizenship in an organized society is not easily measured in dollars and cents; moreover, the District Court found that the actual per capita state expenditures for Jicarilla members are equal to or greater than the per capita expenditures for non-Indian citizens. See App. to Juris. Statement 16. Second, there is no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer—or by those living in the community where the taxpayer is located—must equal the amount of its tax obligations. See *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 491, n. 21 (1987). As we recently explained:

> "[T]here is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. Instead, our consistent rule has been:
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> "'Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
>
> "'A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good.' *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 521–523 (1937) (citations and footnote omitted).
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> . . . . .
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> "There is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause merely because the taxed activity has some connection to interstate com-

merce; particularly when the tax is levied on an activity conducted within the State." *Commonwealth Edison Co.*, *supra*, at 622–623.

Cotton, in effect, asks us to divest New Mexico of its normal latitude because its taxes have "some connection" to commerce with the Tribe. The connection, however, is by no means close enough. There is simply no evidence in the record that the tax has had an adverse effect on the Tribe's ability to attract oil and gas lessees. It is, of course, reasonable to infer that the existence of the state tax imposes some limit on the profitability of Indian oil and gas leases—just as it no doubt imposes a limit on the profitability of off-reservation leasing arrangements—but that is precisely the same indirect burden that we rejected as a basis for granting non-Indian contractors an immunity from state taxation in *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376 (1938); *Oklahoma Tax Comm'n* v. *United States*, 319 U. S. 598 (1943); *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U. S. 342 (1949); *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463 (1976); and *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980).

V

In our order noting probable jurisdiction we invited the parties to address the question whether the Tribe should be treated as a State for the purpose of determining whether New Mexico's taxes must be apportioned. All of the Indian tribes that have filed *amicus curiae* briefs addressing this question—including the Jicarilla Apache Tribe—have uniformly taken the position that Indian tribes are not States within the meaning of the Commerce Clause. This position is supported by the text of the Clause itself. Article I, § 8, cl. 3, provides that the "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Thus, the Commerce Clause draws a clear distinction between "States" and "Indian Tribes." As Chief Justice Marshall observed in *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 18 (1831): "The objects to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian Tribes. When forming this article, the convention considered them as entirely distinct." In fact, the language of the Clause no more admits of treating Indian tribes as States than of treating foreign nations as States. See *ibid.*

It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, see *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327, 330 (1944); *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs, see *Morton* v. *Mancari*, 417 U. S. 535, 551–552 (1974); F. Cohen, Handbook of Federal Indian Law 207–208, and nn. 2, 3 and 9–11 (1982). The extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause. Most notably, as our discussion of Cotton's "multiple taxation" argument demonstrates, the fact that States and tribes have concurrent jurisdiction over the same territory makes it inappropriate to apply Commerce Clause doctrine developed in the context of commerce "among" States with mutually exclusive territorial jurisdiction to trade "with" Indian tribes.

Accordingly, we have no occasion to modify our comment on this question in the *Bracker* case:

> "Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it

> treacherous to import to one notions of pre-emption that are properly applied to the other." 448 U. S., at 143.

The judgment of the New Mexico Court of Appeals is

Affirmed.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Although the Jicarilla Apache Tribe is not a party to the appeal, this case centrally concerns "the boundaries between state regulatory authority and [the Tribe's] self-government." *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 141 (1980). The basic principles that define those boundaries are well established. The Court today, while faithfully reciting these principles, is less faithful in their application.

Pre-emption is essentially a matter of congressional intent. In this case, our goal should be to determine whether the State's taxation of Cotton Petroleum's reservation oil production is consistent with federal Indian policy as expressed in relevant statutes and regulations. First and foremost, we must look to the statutory scheme Congress has established to govern the activity the State seeks to tax in order to see whether the statute itself expresses Congress' views on the question of state taxation. As the discussion in Part I below reveals, the statute most relevant to this case makes clear that Congress intended to foreclose the kind of tax New Mexico has imposed. Second, we must consider other indications of whether federal policy permits the tax in question. Part II below demonstrates that, under established principles, state taxation is pre-empted by federal and tribal interests in this case. Because the record is more than adequate to demonstrate the pre-emptive force of federal and tribal interests, I dissent.[1]

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[1] The Court today addresses, in addition to pre-emption, the question whether the Interstate Commerce Clause applies to problems of multiple state and Indian taxation. I agree with the majority's conclusion in Part V of its opinion that an Indian tribe is not to be equated with a State for pur-

I

The most relevant statute is the Indian Mineral Leasing Act of 1938, 52 Stat. 347, 25 U. S. C. § 396a *et seq.* (1938 Act), pursuant to which the Jicarilla Apache entered into mineral leases with appellant Cotton Petroleum. The 1938 Act is silent on the question of state taxation. But, as interpreted by this Court in *Montana* v. *Blackfeet Tribe*, 471 U. S. 759 (1985), the silence of the 1938 Act is eloquent and argues forcefully against the result reached by the majority.

In *Montana*, the State sought to tax the Blackfeet Tribe's royalty interests under oil and gas leases held, pursuant to the 1938 Act, by non-Indian lessees operating on the reservation. The State sought to do so despite the fact that the 1938 Act contains no express authorization for *any* state tax on such leases. The State based its claim of taxation authority on a 1924 statute enacted to permit oil and gas leasing on Indian reservations created by treaty.[2] Act of May 29, 1924, ch. 210, 43 Stat. 244, 25 U. S. C. § 398 (1924 Act). The 1924 Act contained a proviso that "the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so

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poses of the Interstate Commerce Clause. It would seem to follow that the Clause has no application to this case. I thus see no purpose in the majority's detailed application of Interstate Commerce Clause analysis in Part IV of its opinion.

[2] The Blackfeet Reservation is a treaty reservation. In contrast, the Jicarilla Apache Reservation was created by Executive Order dated February 11, 1887. See 1 C. Kappler, Indian Affairs, Laws and Treaties 875 (1904). Congress enacted legislation in 1927 to govern oil and gas leasing of lands on Executive Order reservations. Indian Oil Act of 1927, ch. 299, § 1 *et seq.* 44 Stat. 1347, codified at 25 U. S. C. § 398a *et seq.* (1927 Act). The 1927 Act, like the 1924 Act, contained a taxation provision: it gave States the power to tax "improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive Order Indian reservations in the same manner as such taxes are otherwise levied or collected." § 398c.

assessed against the royalty interests on said lands." The State took the position that the 1938 Congress could not be presumed by mere silence to have abrogated the law permitting state taxation. 471 U. S., at 765–766.

In *Montana,* we squarely *rejected* the State's argument. After noting that the 1938 Act was "comprehensive legislation," *id.*, at 763, containing a general repealer of all statutory provisions "'inconsistent herewith,'" *id.*, at 764, quoting § 7 of the 1938 Act, see note following 25 U. S. C. § 396a, we held that, under the canons of construction applicable to laws governing Indians, the general repealer clause could not be taken as implicitly incorporating consistent provisions of earlier laws. Rather, in the Indian context, clear congressional consent to state taxation was required and, on that point, we found no "indication that Congress intended to incorporate implicitly in the 1938 Act the taxing authority of the 1924 Act." 471 U. S., at 767. Interpreting the 1938 Act as preserving the taxing authority of the 1924 Act, we held, would not "satisfy the rule requiring that statutes be construed liberally in favor of the Indians." *Ibid.* In addition, we observed that such an interpretation would undermine the purposes of the 1938 Act as reflected in its legislative history: to achieve uniformity in tribal leasing, to harmonize tribal leasing with the goals of the Indian Reorganization Act, Act of June 18, 1934, ch. 576, § 16, 48 Stat. 987, codified at 25 U. S. C. § 476 *et seq.* (IRA), and "to ensure that Indians receive 'the greatest return from their property.'" 471 U. S., at 767, n. 5.

The majority appropriately acknowledges that Congress knew when it enacted the 1938 Act that a statute governing tribal leases that failed expressly to authorize state taxation of Indian royalty interests would have the effect of leaving the States without the power to tax those interests. *Ante,* at 183, n. 14. Thus, the clear import of our decision in *Montana* is that Congress' silence in 1938 expressed an intent substantially to narrow state taxing authority.

But the majority takes the position that the 1938 Act's silence means something completely different when it comes to the kind of taxation at issue here, and expends considerable energy attempting to support that view. The majority argues that the same silence that reflected an intent to prohibit state taxation of Indian tribes' royalty interests was "fully consistent with an intent to permit state taxation *of nonmember lessees*," *ante*, at 183 (emphasis added). The majority notes that when the pre-1938 mineral-leasing statutes were enacted (including the 1927 Act, 44 Stat. 1347, 25 U. S. C. § 398a *et seq.*, which is of the greatest relevance here, see n. 2, *supra*), express congressional authorization was required not only for direct taxes on Indians (or other "sovereigns"), but also for taxes on those who contracted with Indians. See, *e. g.*, *Gillespie* v. *Oklahoma*, 257 U. S. 501 (1922) (applying intergovernmental immunity doctrine to a tax on the net income of the non-Indian holder of a reservation mineral lease). In contrast, "[b]y the time the 1938 Act was enacted, . . . *Gillespie* had been overruled and replaced by the modern rule permitting such taxes absent congressional disapproval." *Ante*, at 182. From this, the majority infers that because Congress knew in 1938 that it could maintain the pre-1938 status quo regarding lessee taxation simply by saying nothing, Congress' silence is consistent with an intent to maintain that status quo.

The argument that the 1938 congressional silence regarding lessee taxation is consistent with an intent to permit such taxation cannot, for two reasons, withstand close scrutiny. First, even if the majority is correct in seeking the meaning of Congress' silence in changes in this Court's intergovernmental tax immunity jurisprudence, the facts defeat the majority's theory. Second, and fundamentally, the majority's court-centered approach fails to give due weight to a far more significant intervening event: the major change in federal Indian policy embodied in the IRA.

The case which overruled Justice Holmes' opinion for the Court in *Gillespie* was *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376 (1938). *Mountain Producers* was decided on March 7, 1938. The majority, indeed, is correct that the 1938 Act was enacted on May 11, 1938, after that case was decided. But a review of the history of the 1938 Act reveals that it had assumed final form well before this Court's decision in *Mountain Producers*. The majority's chronology thus is somewhat misleading, at least if the realities of the legislative process are to have any relevance to the analysis of legislative intent.

The 1938 Act was drafted by the Department of the Interior and was submitted to the respective Committees on Indian Affairs of the House and Senate on June 17, 1937. See S. Rep. No. 985, 75th Cong., 1st Sess., 1 (1937) (Senate Report); H. R. Rep. No. 1872, 75th Cong., 3d Sess., 1 (1938) (House Report).[3] The proposed bill was reported out of the Senate Committee in July 1937, with a recommendation that it be passed without amendment. Senate Report, at 1. The bill was passed by the Senate without debate on August 6, 1937. See 81 Cong. Rec. 8399. The bill was reported out of the House Committee on Indian Affairs on March 3, 1938, again with a recommendation that it pass without amendment. House Report, at 1. All this took place before the March 7, 1938, decision in *Mountain Producers*, during a period in which, the majority acknowledges, the proposed statute's silence on the question of taxation would have meant that the States had no power to tax non-Indian lessees' oil and gas production. The House passed the bill, also without debate, on May 2, 1938. See 83 Cong. Rec. 6057–6058.

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[3] The 1938 Act began to take form in 1935 and 1936. See, *e. g.*, 79 Cong. Rec. 7815 (1935) (concerning S. 2638). From the beginning, this legislation was drafted and promoted by the Department of the Interior, and the Department stated that the intent of the proposed legislation was to harmonize federal leasing law with the IRA "and the policy of the Government thereunder for the organization and rehabilitation of Indian tribes and tribal matters." Letter dated March 26, 1936, regarding S. 2638, from Secretary Harold L. Ickes to Rep. Will Rogers, Chairman of the House Committee on Indian Affairs, reprinted in App. to Brief for Petitioners in *Montana* v. *Blackfeet Tribe*, O. T. 1983, No. 83–2161, p. 6.

Thus, although the majority is technically correct that the 1938 Act did not become law until after the announcement of this Court's decision in *Mountain Producers*, the legislation was formulated, considered by the House and Senate Committees, referred out of the Committees without amendment, and passed by the Senate, all before *Mountain Producers* on March 7, 1938, changed the law of intergovernmental tax immunity. Up until that point, the clear meaning of the statute, as our decision in *Montana* makes clear, is that the State lacked power to impose the tax at issue in this case. There is no evidence that the change in the law wrought by *Mountain Producers* was brought to the attention of the House. It defies historical sense to make *Mountain Producers* the centerpiece of the interpretation of a statute which reached final form before *Mountain Producers* was decided.[4]

The Court in *Montana* put forward a more sensible explanation of the absence of state taxation authority in the 1938 Act. As the relevant House and Senate Reports explain, the 1938 Act was crafted, proposed, and enacted in light of the recently enacted IRA. The IRA worked a fundamental change in federal Indian law marked by two principal goals: "'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 152 (1973), quoting H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). In reviewing pre-1934 Indian mineral-leasing statutes, the Interior Department found them wanting in both respects. The statutes not only gave the Indians no "voice" in the granting of leases, but also were not "adequate to give Indians the greatest return from their property." House Report, at 2; Senate Report, at 2. The 1938 Act was proposed to "bring all mineral-leasing matters in harmony with the Indian Reorganization Act" in these respects. House Report, at 3; Senate Report, at 3. The Court observed in *Montana* that "these purposes would be undermined" by treating the 1938 Act as explicitly or implicitly leaving the taxation provisions of prior statutes in force. 471 U. S., at 767, n. 5.[5]

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[4] The inference the majority seeks to draw from the chronology of the 1938 Act is further weakened by an analysis of *Mountain Producers* itself. That case concerned federal taxation of income received by a private developer from an oil and gas lease of land owned by the State of Wyoming. In holding that the tax on the lessee's profits was not barred by the intergovernmental tax immunity, the Court expressly overruled *Gillespie*. See 303 U. S., at 387. Both *Gillespie* and *Mountain Producers* concerned income taxes. It took 10 more years for the Court to reject the application of the intergovernmental immunity doctrine to state gross production and excise taxes on oil produced by non-Indian lessees from leased Indian lands, and to overrule a line of pre-1938 decisions to the contrary. See *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U. S. 342, 367 (1949). Even if Congress had considered *Mountain Producers* in enacting a bill that was silent as to state taxation, it would have been the prudent course for Congress, in view of the continued uncertainty of the law, to have used express language had it wished to perpetuate state tax authority.

The majority's observation, *ante*, at 182, that "[t]here is . . . no history of tribal independence from state taxation of these lessees to form a 'backdrop' against which the 1938 Act must be read" cannot be dispositive. The IRA, enacted only a few years before the 1938 Act, is itself sufficient "backdrop" to inform our interpretation, for the IRA marked the rejection of all the assumptions upon which prior statutes providing for state taxation of reservation mineral production had been based.

The expectation that animated Indian policy under the General Allotment Act of 1887, ch. 119, 24 Stat. 388, was that at the expiration of a 25-year trust period, there would be no difference between Indians and other citizens: tribal life would come to an end, the Indians would be assimilated and fully subject to state governmental authority, Indian lands would be freely alienable to non-Indians and subject to state taxation, and surplus lands would be opened to private development. See generally F. Cohen, Handbook of Federal Indian Law 131–132 (1982); Readjustment of Indian Affairs: Hearings on H. R. 7902 before the House Committee on Indian Affairs (History of the Allotment Policy), 73d Cong., 2d Sess., pt. 9, pp. 428–489 (1934); *Blackfeet Tribe* v. *Montana*, 729 F. 2d 1192, 1195 (CA9 1984), aff'd, 471 U. S. 759 (1985).

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[5] The majority correctly notes, *ante*, at 178–180, that the Department of the Interior, in proposing this legislation, advised Congress of the need to change particular technical rules which had made Indian lands less favorable for mining than federal public lands. But those comments in the Department's transmittal letter to Congress do not support the view put forth by the majority that the sole purpose of the 1938 Act was to achieve parity in that respect.

With the passage of time, eventual state control remained the goal of the allotment policy, but delays in the full implementation of that policy became a matter of concern to the States. This was particularly evident in the area of mineral leasing. Such leasing for periods of up to 10 years had been authorized by statute in 1891, Act of Feb. 28, 1891, ch. 383, § 3, 26 Stat. 795, but it became increasingly clear that longer-term leases were an economic necessity. A pattern soon developed: in return for Congress' extending the period during which mineral rights would be reserved to the Indian tribes, States were given the power to tax mineral production. See 3 Indians of the United States, Hearings before a Subcommittee of the House Committee on Indian Affairs 191–192, 281, 444–445 (1920). The taxation proviso in the 1924 Act, which was included at the insistence of members of the Subcommittee, was true to that pattern. See H. R. No. 386, 68th Cong., 1st Sess. (1924); see generally Brief for United States as *Amicus Curiae* in *Montana* v. *Blackfeet Tribe*, O. T. 1983, No. 83–2161, pp. 16–26.

By 1927, when Congress addressed the problem of oil and gas leasing on Executive Order reservations, the States were anxious to open those lands for mineral development and the debate in Congress squarely addressed the conflicting interests of States and Indian tribes. The Attorney General had issued a controversial opinion that the Mineral Lands Leasing Act of 1920, 41 Stat. 437, did not apply to Executive Order reservations, 34 Op. Atty. Gen. 181 (1924) (opinion of then-Attorney General Harlan F. Stone), and the matter was in litigation. See Development of Oil and Gas Mining Leases on Indian Reservations, Hearings on S. 1722 and S. 3159 before the Subcommittee of the Senate Committee on Indian Affairs, 69th Cong., 1st Sess., 29–30 (1926). If the Attorney General's position did not prevail in the courts, the Indians would receive *no* income from mineral production on Executive Order reservations, and any claim of Indian entitlement to those reservations would be substantially undermined. In that uncertain legal climate, the 1927 Act is best viewed as a compromise: Indian interests acquiesced in the States' claim that they had a right to increase their general revenues by sharing in the profits of reservation mining activities; in return, the Indians avoided legislation that would have obliterated any hope of obtaining recognition of their legal entitlement to Executive Order lands. See *id.*, at 9, 55, 61, 63, 98–99. See also Hearings on S. 3159 and S. 4152 before the Senate Committee on Indian Affairs, 69th Cong., 1st Sess., 14, 24–25, 33–34 (1926).[6]

The political climate changed dramatically with the passage in 1934 of the IRA, in which "'[t]he policy of allotment and sale of surplus reservation land was repudiated'" as antithetical to tribal interests. *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463, 479 (1976), quoting *Mattz* v. *Arnett*, 412 U. S. 481, 496, n. 18 (1973). It would be a mistake to impute the political compromises of the allotment period into legislation enacted soon after the passage of the IRA, legislation expressly tailored to bring Indian mineral policy into line with a radically altered set of assumptions about the political and economic future of the Indians.

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[6] The compromise, as implemented, permitted the States to tax the producers of oil and gas, and freed the States to use those proceeds in any manner they chose, with no requirement that the taxes be used to benefit either Indians or reservation activities. See S. Rep. No. 768, 69th Cong., 1st Sess., 6 (1926).

Furthermore, the IRA embodied an approach to tribal independence which would be undone by limiting Indian tribes to those powers they had been permitted to exercise in the past. The Department of the Interior, in interpreting the IRA at Congress' request, realized that the assertions of Indian automomy that the IRA sought to foster would seem novel, and would likely come at the expense of settled state expectations.

> "It is a fact that State governments and administrative officials have frequently trespassed upon the realm of tribal autonomy, presuming to govern the Indian tribes through State law or departmental regulation or arbitrary administrative fiat, but these trespasses have not impaired the vested legal powers of local self-government which have been recognized again and again when these trespasses have been challenged by an Indian tribe. 'Power and authority rightfully conferred do not necessarily cease to exist in consequence of long non-user'. . . . The [IRA], by affording statutory recognition of these powers of local self-government and administrative assistance in developing adequate mechanisms for such government, may reasonably be expected to end the conditions that have in the past led the Interior Department and various State agencies to deal with matters that are properly within the legal competence of the Indian tribes themselves." Powers of Indian Tribes, 55 I. D. 14, 28–29 (1934).

The Department noted: "Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation." *Id.*, at 46. It would be entirely consistent with the spirit of the IRA for the Department, and for Congress, to have done away with the express authorization of state taxation in order to leave room for Indians to operate in the sphere of taxation unimpeded by the States. That Indians had never before asserted the right to freedom from state taxation was simply a product of the unfortunate state of affairs that the IRA sought to remedy.

In sum, we are given to choose between two possible interpretations of the silence of the 1938 Act. One, adopted by the majority, focuses on the change in this Court's intergovernmental immunity doctrine which took place at the very end of the process leading to the 1938 Act. The other focuses on a fundamental change in congressional Indian policy which took place shortly before the process began, and was expressly noted as its motivating force. The latter interpretation is clearly the more compelling. I must conclude that, contrary to the majority's view, the silence of the 1938 Act is not consistent with a congressional intent that non-Indian lessees of Indian mineral lands shall be subject to state taxation for their on-reservation activities.[7] This conclusion does not constitute, as the majority says, a "return to [the] long-discarded and thoroughly repudiated doctrine" of constitutional intergovernmental tax immunity. *Ante*, at 187. Rather, it reflects a fuller understanding of the policies underlying federal Indian law in the mid- to late-1930's and continuing, in relevant part, into the present time.

II

Even if we did not have such direct evidence of Congress' intent to preclude state taxation of non-Indian oil production on Indian lands, that conclusion would be amply supported by a routine application of the traditional tools of Indian pre-emption analysis. The majority concludes otherwise because it distorts the legal standard it purports to apply. Instead of engaging in a careful examination of state, tribal, and federal interests required by our precedents, see *e. g.*, *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue of New Mexico*, 458 U. S. 832, 838 (1982), the majority has adopted the principle of "the inexorable zero." *Teamsters* v. *United States*, 431 U. S. 324, 342, n. 23 (1977). Under the majority's approach, there is no pre-emption unless the States are *entirely* excluded from a sphere of activity and provide *no* services to the Indians or to the lessees they seek to tax. That extreme approach is hardly consistent with the "flexible" standard the majority purports to apply. *Ante*, at 184.

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[7] Even if the silence of the 1938 Act simply were held to be ambiguous, our precedents consistently have required that ambiguities in statutes affecting tribal interests be resolved in favor of Indian independence. *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue of New Mexico*, 458 U. S. 832, 838 (1982); *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 143–144 (1980). That canon of interpretation would require rejecting the conclusion the majority reaches here.

The Court has identified "two independent but related barriers to the assertion of state regulatory authority over tribal reservations." *White Mountain Apache Tribe* v. *Bracker*, 448 U. S., at 142. The exercise of state authority may be impermissible solely on the ground that the state intervention would interfere with "the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U. S. 217, 220 (1959). Alternatively, state law may be pre-empted by the existence of a comprehensive federal regulatory scheme governing the subject matter. See, *e. g.*, *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685, 688–690 (1965). These methods of analysis overlap. Indian sovereignty is not a "platonic" concept. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 172 (1973). It is a growing tradition, actively supported by federal legislation. Our pre-emption cases recognize that "federal law . . . reflects . . . related federal and tribal interests," and that "the . . . encouragement of [Indian] sovereignty in congressional Acts promoting tribal independence and economic development" must inform our pre-emption analysis. *Ramah Navajo*, 458 U. S., at 838. In this case, all the elements that traditionally have resulted in a finding of federal pre-emption are present.

Federal regulation of leasing of Indian oil lands "is both comprehensive and pervasive." *Id.*, at 839. Provisions of the 1938 Act regulate all stages of the process of oil and gas leasing and production on Indian reservations. The auction or bidding process through which leases are acquired is supervised by the Department of the Interior. 25 U. S. C. § 396b. Successful lessees must furnish a bond to secure compliance with lease terms, § 396c, and each lessee's operations are in all respects subject to federal rules and regulations, § 396d. Longstanding regulations promulgated pursuant to the 1938 Act govern the minute details of the bidding process, 25 CFR § 211.3 (1988), and give the Secretary of the Interior the power to reject bids that are not in the best interest of the Indian lessor, § 211.3(b). Federal law sets acreage limitations, § 211.9, the term of each lease, § 211.10, and royalty rates, methods, and times of payment, §§ 211.13 and 211.16. Turning to the regulation of the lessee's operations, federal law controls when operations may start, § 211.20, and federal supervisory personnel are empowered to ensure the conservation of resources and prevention of waste, §§ 211.19–211.21. Additional restrictions are placed on lessees by the Federal Oil and Gas Royalty Management Act of 1982, 96 Stat. 2447, 30 U. S. C. § 1701 *et seq.*, which further safeguards tribal interests by imposing additional inspection, collection, auditing, security, and conservation requirements on lessees.

In addition, the Jicarilla Apache, as expressly authorized by their Constitution, have enacted regulations of their own to supplement federal guidelines, and have created a tribal Oil and Gas Administration to exercise tribal authority in this area.[8] See Jicarilla Apache Tribal Code, Tit. 18, ch. 1, §§ 1–7 (1987) and their Revised Constitution, Art. XI, § 1(a)(3). Indeed, just as we earlier found of the Mescalero Apache: "The Tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's . . . resources specifically for the benefit of its members." *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 341 (1983).

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[8] Tribal regulation is expressly contemplated by regulations promulgated under the 1938 Act, which specify that certain statutory and regulatory provisions "may be superseded by the provisions" of tribal law enacted pursuant to the IRA. 25 CFR § 211.29 (1988).

The majority acknowledges that federal and tribal regulations in this case are extensive. But because the District Court found that the State regulates spacing and the mechanical integrity of wells, and that federal and tribal regulations are therefore not "exclusive," the majority concludes without further ado that there is sufficient state activity to support the State's claimed authority to tax.[9] The majority's reliance on the proposition that "[t]his is not a case in which the State has had nothing to do with the on-reservation activity, save tax it," *ante*, at 186, reflects a mechanical and absolutist approach to the delicate issue of pre-emption that this Court expressly has repudiated. *White Mountain Apache*, 448 U. S., at 145. "[C]omplete abdication or noninvolvement," *ante*, at 185, has never been the applicable standard.

The taxes the State seeks to impose "would threaten the overriding federal objective of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [their oil and gas reserves are] capable of yielding,'" and would "reduc[e] tribal revenues and diminis[h] the profitability of the enterprise for potential contractors." *White Mountain Apache*, 448 U. S., at 149. State taxes would also reduce the funds available to oil and gas producers to meet the financial obligations placed upon them by the extensive federal and tribal regulatory schemes. *Ibid.* Tribal and federal regulations clearly leave no room for these taxes. See *id.*, at 151, n. 15.

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[9] The manner in which a State exercises a regulatory role in the area of well spacing indeed underscores the comprehensiveness of *federal* law in this area: state law applies not of its own force, but only if its application is approved by the Bureau of Land Management. Furthermore, additional federal spacing requirements apply to Indian lands. See 43 CFR §§ 3162.3-1(a) and (b) (1987).

Just as the majority errs by adopting a standard of "exclusivity," it places undue significance on the fact that the State made some expenditures that benefited Cotton Petroleum's on-reservation activities.[10] Concededly, the State did spend some money on the reservation for purposes directly and indirectly related to oil and gas production. It is clear on this record, however, that the infrastructure which supports oil and gas production on the Jicarilla Apache Reservation is provided almost completely by the federal and tribal governments rather than by the State. Indeed, the majority appears to accept the fact that the state taxes are vastly disproportionate, *ante*, at 185, as well it must: $89,384 in services, as compared with $2,293,953 in taxes, speaks for itself.[11] But the majority deems this fact legally irrelevant in order to avoid imposing a "proportionality requirement" that would be inconsistent with the notion that taxation is not based on a *quid pro quo*. *Ante*, at 185, n. 15. That notion, drawn from Due Process and Commerce Clause analysis, see *ante*, at 189–190, is inapposite in the pre-emption context. Preemption analysis calls for a close consideration of conflicting interests and of their potential impact on one another. Under the majority's analysis, insignificant state expenditures, reflecting minimal state interests, are sufficient to support state interference with significant federal and tribal interests. The exclusion of all sense of proportion has led to a result that is antithetical to the concerns that animate our Indian pre-emption jurisprudence.

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[10] To the extent that the majority relies on services provided to members of the Tribe or on off-reservation services provided to Cotton Petroleum, see *ante*, at 185, 189, those expenditures are not relevant under our precedents. We held in *Ramah Navajo*, that services provided to a contractor off the reservation are "not a legitimate justification" for taxing on-reservation activity, because "[p]resumably, the state tax revenues derived from [the contractor's] off-reservation business activities are adequate to reimburse the State for the services it provides." 458 U. S., at 844, and n. 9. In that case, we also considered and rejected off-reservation services to members of the Tribe as a basis for state taxation. We were "unpersuaded by the State's argument that the significant services it provides to the Ramah Navajo Indians justify the imposition of this tax. The State does not suggest that these benefits are in any way related to [the on-reservation activity the State seeks to tax]." *Id.*, at 845, n. 10.

[11] The distribution of responsibility is even clearly reflected in the relevant oil-and-gas-related expenditures during the 5-year period at issue in this case: federal expenditures were $1,206,800; tribal expenditures were $736,358; the State spent, at most, $89,384. Brief for Jicarilla Apache Tribe as *Amicus Curiae* 10–11, n. 8. In any event, it is clear from this Court's rejection of the Montana severance tax at issue in *Montana* v. *Crow Tribe*, 484 U. S. 997 (1988), that the mere fact that the State has made some expenditures that benefit the taxed activities is not sufficient to avoid a finding of pre-emption. See Motion to Affirm for United States in *Montana* v. *Crow Tribe*, O. T. 1987, No. 87–343, p. 21 (Montana spent $500,000 to pay 25% of the cost of a road used by employees and suppliers of a mine).

Finally, the majority sorely underestimates the degree to which state taxation of oil and gas production adversely affects the interests of the Jicarilla Apache. Assuming that the Tribe continues to tax oil and gas production at present levels, on-reservation taxes will remain 75% higher (14% as opposed to 8% of gross value) than off-reservation taxes within the State. The state trial court was not disturbed by this fact: it found that Cotton Petroleum had plans to dig new wells, and took that to be proof positive that the taxes imposed by the State did not deter drilling. But the court failed to recognize that Cotton Petroleum's new wells were infield (or "infill") wells, drilled between existing producing wells to increase the efficiency of drainage on lands already leased. Tr. 41–42, 68; see H. Williams & C. Meyers, Oil and Gas Terms 468 (7th ed. 1987). An infill well is essentially a no-risk proposition, in that there is little doubt that the well will be productive. Therefore, Cotton Petroleum's willingness to drill infill wells does not reflect its willingness to develop new lands. Federal and tribal interests legitimately include long-term planning for development of lease revenues on new lands, where there is greater economic risk, see Tr. 450, and a greater probability that difference in tax rates will have an adverse effect on a producer's willingness to drill new wells and on the competitiveness of Jicarilla leases. *Id.*, at 68, 504. "[B]oth the rate at which mining companies acquire Indian land leases and the rate at which they develop them are dependent on the future balance between the deterrents to and the advantages of Indian land leasing. Where the balance will be struck cannot be predicted, for there are simply too many variables involved." Federal Trade Commission, Staff Report on Mineral Leasing on Indian Lands 48 (1975) (FTC Report). Dual state and tribal taxation inevitably affects that balance.

In weighing the effect of state taxation on tribal interests, logic dictates that it is necessary to consider not only the size of the tax, but also the importance of the taxed activity to the tribal economy. See *California* v. *Cabazon Band of Mission Indians*, 480 U. S. 202, 218 (1987) (noting, in invalidating state regulation of tribal bingo operations, that bingo games constituted the sole source of tribal income). In this case, too, it is undisputed that oil and gas production *is* the Jicarilla Apache economy—a common pattern in reservations with substantial oil and gas reserves. See Tr. 159 (oil and gas royalties account for 90% of tribal income); FTC Report, at 10; Anders, Indians, Energy, and Economic Development, 9 J. Contemp. Business 57 (1980).

Furthermore, where, as here, the Tribe has made the decision to tax oil and gas producers, the long-term impact of state taxation on the Tribe's freedom of action in the sphere of taxation must also be considered.[12] Tribal taxation has been widely perceived as necessary to protect Indian interests.[13] The fact that the Jicarilla Apache have seen fit to impose their own taxes renders the threat to tribal interests which is always inherent in state taxation all the more apparent.[14] The market can bear only so much taxation, and it is inevitable that a point will be reached at which the State's taxes will impose a ceiling on tribal tax revenues. That the Jicarilla Apache have not yet raised their taxes to a level at which the combined effect of tribal and state taxation has been proved to diminish tribal revenues cannot be dispositive. Our decisions have never required a case-specific showing that state taxation in fact has deterred tribal activity; the potential for conflict is sufficient.

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[12] The decision to impose tribal taxes was approved by the Federal Government. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 136 (1982).

[13] See, *e. g.*, Snipp, American Indians and Natural Resource Development, 45 Am. J. Econ. & Soc. 457, 468 (1986); 1 American Indian Policy Review Commission, Final Report 339, 342, 343–344, 347 (1977) (concluding that state taxes on lessees lower Indian royalties and interfere with Indian taxation); Task Force Seven, Reservation and Resource Development and Protection, Final Report to the American Indian Policy Review Commission 139, 143, 145 (Comm. Print 1976).

The majority observes that this is not "a case in which an unusually large state tax has imposed a substantial burden on the Tribe," *ante*, at 186, and deems the tribal interest "indirect and . . . insubstantial," *ante*, at 187. But the majority does not explain why interferences with federal policy of only the dramatic magnitude of the tax at issue in *Montana* v. *Crow Tribe*, 484 U. S. 997 (1988), meet the pre-emption threshold. In *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S., at 691, the Court rejected a 2% tax on the gross proceeds of a non-Indian trader on an Indian reservation because it put "financial burdens on [the trader] or the Indians . . . in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians." Indeed, the dissenters in *White Mountain Apache* characterized the less-than-1% tax struck down in that case as "relatively trivial" and "unlikely to have a serious adverse impact on the tribal business," 448 U. S., at 159 (STEVENS, J., dissenting). That the tax burden was held sufficient to support a finding of pre-emption in *White Mountain Apache* and *Warren Trading Post* undermines the majority's position here.

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[14] Although this Court ruled in *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980), that the mere fact of Indian taxation does not oust a State's power to tax, this Court clearly relied in *Colville* on the fact that value generated by the activity there at issue (smokeshops) was not developed on the reservation by activities in which the Tribe had an interest. We observed in *Colville* that the Tribe was basically importing goods and marketing its tax immunity. *Id.*, at 155. That is not so here. Indeed, our decision in *Colville* expressly left open the possibility that "the Tribes themselves could perhaps pre-empt state taxation through the exercise of properly delegated federal power to do so." *Id.*, at 156.

III

In sum, under established Indian pre-emption principles, the case before us should have been straightforward. We deal here with state taxes on oil producers engaged in the development of the natural resource upon which the economic future of the Jicarilla Apache depends. The federal statute governing the producers' activities, unlike its historical predecessors, contains no express authorization of state taxation. That statute was enacted in a period in which concern with tribal sovereignty and tribal self-sufficiency was at the very core of federal Indian policy. Pursuant to that statute, the Federal Government regulates every aspect of the producers' activities to advance the Indians' best interests. The statute also encourages tribes to assert their own sovereign authority in this area; the Jicarilla Apache have done so through regulation and taxation. On the other side of the balance, New Mexico asserts little more than a desire to increase its general revenues at the expense of tribal economic development. That purpose "is insufficient to justify the additional burdens imposed by the tax on the comprehensive federal scheme . . . and on the express federal policy of encouraging Indian self-sufficiency in [this] area." *Ramah Navajo,* 458 U. S., at 845.

I respectfully dissent.

SKINNER, SECRETARY OF TRANSPORTATION *v.* MID-AMERICA PIPELINE CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 87-2098. Argued March 1, 1989—Decided April 25, 1989

Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) directs the Secretary of Transportation (Secretary) to establish a schedule of pipeline safety user fees based on usage of hazardous pipelines and to collect such fees annually from persons operating pipeline facilities subject to the Hazardous Liquid Pipeline Safety Act of 1979 (HLPSA) and the Natural Gas Pipeline Safety Act of 1968 (NGPSA). Section 7005—designed to make the administration of the HLPSA and the NGPSA self-financing—provides that the assessed fees be used to finance activities authorized by the HLPSA and the NGPSA and that such fees may not exceed 105 percent of the aggregate of congressional appropriations for the fiscal year for activities to be funded by the fees. Pursuant to this mandate, the Secretary published fee schedules and assessed fees for fiscal year 1986. Appellee Mid-America Pipeline Co.—which owns and operates pipelines that transport hazardous liquids and is, therefore, subject to the HLPSA—paid its fees under protest and filed suit against the Secretary in the District Court for declaratory and injunctive relief. On cross-motions for summary judgment, the court adopted the conclusions of a Magistrate recommending that § 7005 be struck down as an unconstitutional delegation to the Department of Transportation of Congress' taxing power on the grounds that the assessments were taxes rather than fees, and that, in enacting § 7005, Congress did not give the kind of guidance to the Secretary necessary to avoid the conclusion that Congress had unconstitutionally delegated such power to the Executive Branch.

Held: Section 7005 of COBRA is not an unconstitutional delegation of the taxing power by Congress to the Executive Branch. Pp. 218–224.

(a) The multiple restrictions Congress placed on the Secretary's discretion to assess user fees meet the normal requirements of the nondelegation doctrine, which requires that Congress provide an administrative agency with standards guiding its actions such that a court can ascertain whether the will of Congress has been obeyed. In enacting § 7005, Congress delimited the scope of the Secretary's discretion with greater specificity than in other delegations this Court has upheld. The Secretary may not collect fees from firms not subject to either of the two

Pipeline Safety Acts or use the funds for purposes other than administering such Acts; he may not set fees on a case-by-case basis, apply a fee-setting criteria other than one of those delineated by Congress, or establish a fee schedule that does not bear a reasonable relationship to these criteria; and he has no discretion to expand the budget for administering the Pipeline Safety Acts because of the 105 percent ceiling. Pp. 218–220.

(b) Even if the user fees are a form of taxation, neither the Constitution nor congressional practices require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power. There is nothing in the placement of the Taxing Clause—first in place among the powers of Congress enumerated in Art. I, § 8, of the Constitution—that would distinguish the power to tax from other enumerated powers in terms of the scope and degree of authority that Congress may delegate to the Executive Branch to execute the laws. Moreover, the Origination Clause—which requires that all revenue bills originate in the House of Representatives—implies nothing about the scope of Congress' power to delegate discretionary authority under its taxing power once a bill has been properly enacted. Even when enacting tax legislation with remarkable specificity, as it has done in the Internal Revenue Code, Congress has delegated the authority to prescribe, and to determine the retroactivity of, rules and regulations for enforcement of the Code. Congress relies on administrators and the courts to implement the legislative will since it cannot be expected to anticipate every conceivable problem that can arise or carry out day-to-day oversight. Pp. 220–223.

(c) This Court's decisions in *National Cable Television Assn., Inc.* v. *United States*, 415 U. S. 336, and *FPC* v. *New England Power Co.*, 415 U. S. 345, are not to the contrary, since they stand only for the proposition that Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as "fees" or "taxes," on those parties. Section 7005 explicitly reflects Congress' intent that the total costs of administering the HLPSA and the NGPSA be recovered through assessment of charges on those regulated by the Acts. Pp. 223–224.

Reversed.

O'Connor, J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Merrill argued the cause for appellant. With him on the briefs were former *Solicitor General Fried, Acting Assistant Solicitor General Bryson,* *Assistant Attorney General Bolton*, *Brian J. Martin*, and *Bruce G. Forrest*.

Richard McMillan, Jr., argued the cause for appellee. With him on the brief were *Clifton S. Elgarten*, *Luther Zeigler*, and *Kristen E. Cook*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

We decide today whether § 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, which directs the Secretary of Transportation to establish a system of user fees to cover the costs of administering certain federal pipeline safety programs, is an unconstitutional delegation of the taxing power by Congress to the Executive Branch. We hold that it is not.

I

A

In 1986, Congress enacted the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. 99–272, 100 Stat. 82. Section 7005 of COBRA, codified at 49 U. S. C. App. § 1682a (1982 ed., Supp. IV), and entitled "Pipeline safety user fees," directs the Secretary of Transportation (Secretary) to "establish a schedule of fees based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines." § 7005(a)(1). These fees are to be collected annually, § 7005(b), from "persons operating—(A) all pipeline facilities subject to the Hazardous Liquid Pipeline Safety Act of 1979 (49 U. S. C. App. 2001 et seq.); and (B) all pipeline transmission facilities and all liqui-

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*Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States et al. by *Richard M. Smith*, *Robin S. Conrad*, *John H. Cheatham III*, *Linda G. Stuntz*, *Steven G. McKinney*, and *Richard D. Avil, Jr.*; for Florida Power & Light Co. et al. by *Jay E. Silberg*, *Joseph B. Knotts, Jr.*, *Scott M. DuBoff*, *Harold F. Reis*, and *Michael F. Healy*; and for the National Taxpayers Union et al. by *Gale A. Norton*.

fied natural gas facilities subject to the jurisdiction of the Natural Gas Pipeline Safety Act of 1968 (49 U. S. C. App. 1671 et seq.)." § 7005(a)(3). The Hazardous Liquid Pipeline Safety Act (HLPSA) regulates interstate and intrastate pipelines carrying petroleum, petroleum products, or anhydrous ammonia. See 49 CFR pt. 195 (1987). The Natural Gas Pipeline Safety Act of 1968 (NGPSA), in turn, regulates certain liquified natural gas (LNG) facilities, see 49 CFR pt. 193 (1987), as well as interstate and intrastate pipelines carrying natural gas, flammable gas, or gas that is toxic or corrosive, see 49 CFR pts. 191, 192 (1987).

The fees collected under § 7005 of COBRA are to be used "to the extent provided for in advance in appropriation Acts, only—

> "(1) in the case of natural gas pipeline safety fees, for activities authorized under the Natural Gas Pipeline Safety Act of 1968 . . . ; and
>
> "(2) in the case of hazardous liquid pipeline safety fees, for activities authorized under the Hazardous Liquid Pipeline Safety Act of 1979 . . . ." § 7005(c).

These "activities" include Department of Transportation expenses incurred in administering the Pipeline Safety Acts, such as salaries, travel, printing, communication, and supplies, as well as "regulatory, enforcement, training and research costs, and State grants-in-aid." 51 Fed. Reg. 25783 (1986). The fees assessed and collected are to be "sufficient to meet the costs of [these] activities . . . but at no time shall the aggregate of fees received for any fiscal year . . . exceed 105 percent of the aggregate of appropriations made for such fiscal year for activities to be funded by such fees." § 7005(d). Section 7005 of COBRA is one of a number of recent congressional enactments designed to make various federal regulatory programs partially or entirely self-financing. *E. g.*, § 3401 of the Omnibus Budget Reconciliation Act of 1986, 100 Stat. 1890, codified at 42 U. S. C. § 7178 (1982 ed., Supp. IV) (entire regulatory budget of the Federal Energy

Regulatory Commission); COBRA § 7601, codified at 42 U. S. C. § 2213 (1982 ed., Supp. IV) (33 percent of regulatory budget of the Nuclear Regulatory Commission; 45 percent in fiscal years 1988 and 1989).

Pursuant to the mandate of § 7005, the Secretary published fee schedules for fiscal year (FY) 1986 on July 16, 1986. 51 Fed. Reg. 25782 (1986). Prior to publication, the Secretary consulted the pipeline industry's major trade associations for assistance in determining the appropriate basis for assessing fees within the range of options permitted by § 7005(a)(1). The consensus of these trade associations—the American Petroleum Institute, the American Gas Association, the Interstate Natural Gas Association of America, and the Association of Oil Pipe Lines—was that pipeline mileage (referred to simply as "miles" in § 7005) would provide "the most reasonable basis for determining fees . . . ." 51 Fed. Reg. 25782 (1986). The Secretary agreed with this consensus for purposes of the FY 1986 fee schedules. In comments submitted to the Secretary for consideration of possible changes to be made in the fee schedules for FY 1987, about one-third of those commenting objected to pipeline mileage as the basis for assessing fees, arguing that volume-miles would provide a more accurate indicator of the term "usage" in § 7005 and that mileage alone did not fairly reflect the Department of Transportation's enforcement expenditures. The Secretary decided to continue assessing § 7005 fees based on mileage because of the ease of administering such a system and because "long pipelines of small diameter require just as much if not more enforcement effort than shorter pipelines of large diameter." *Id.*, at 46978.

The Secretary also determined that the total pipeline safety program costs, excluding State grants-in-aid, should be allocated at 80 percent for persons regulated by the NGPSA and 20 percent for persons regulated by the HLPSA. The costs of grants were to be allocated at 95 percent for persons regulated by the NGPSA and 5 percent for persons regulated by the HLPSA. Five percent of the total gas program costs were to be borne by LNG facility operators allocated as a function of storage capacity and number of LNG plants. *Id.*, at 25783, 46976. Finally, the Secretary estimated that the administrative costs of assessing fees on the 23 percent of the Nation's gas operators with less than 10 miles of gas pipeline and the 17 percent of the Nation's hazardous liquid operators with less than 30 miles of hazardous liquid pipeline would exceed the value of the fees assessed. Accordingly, the Secretary exempted these small mileage operators from assessment of § 7005 fees. *Ibid.*

On the basis of this fee schedule framework, the Secretary set fees of $23.99 per mile for gas pipelines and $6.41 per mile for hazardous liquid pipelines in FY 1986. Operators of LNG facilities were assessed lump sums ranging from $1,250 to $7,500 per plant. *Id.*, at 25783. The total costs for both pipeline safety programs were $7.773 million, $8.523 million, and $8.550 million for FY's 1986, 1987, and 1988 respectively. Brief for Appellant 4, n. 2. Expenses for FY 1989 are estimated at $9.3 million. See Department of Transportation and Related Agencies Appropriations Act, 1989, Pub. L. 100–457, 102 Stat. 2143–2144.

B

Appellee Mid-America Pipeline Company, based in Tulsa, Oklahoma, owns and operates pipelines that transport hazardous liquids and is, therefore, subject to the regulatory strictures of the HLPSA. On July 28, 1986, pursuant to its recently published fee schedule, the Secretary assessed Mid-America $53,023.52 as its share of the cost of federal administration of the HLPSA. Mid-America paid that sum under protest and filed suit against the Secretary in the United States District Court for the Northern District of Oklahoma seeking declaratory and injunctive relief. On cross-motions for summary judgment, the United States Magistrate assigned to the case recommended that § 7005 of COBRA be struck down as an unconstitutional delegation to the Department of Transportation of Congress' taxing power. Relying primarily on our decisions in *National Cable Television Assn., Inc.* v. *United States*, 415 U. S. 336 (1974), and *FPC* v. *New England Power Co.*, 415 U. S. 345 (1974), the Magistrate concluded that the assessments made under § 7005 are taxes rather than fees. The Magistrate then determined in light of *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394 (1928), and *American Power & Light Co.* v. *SEC*, 329 U. S. 90 (1946), that, in enacting § 7005, Congress did not give the kind of guidance to the Secretary necessary to avoid the conclusion that Congress had unconstitutionally delegated its taxing power to the Executive Branch.

The District Court adopted these conclusions and entered judgment for Mid-America on February 9, 1988. Invoking this Court's appellate jurisdiction under 28 U. S. C. § 1252, the Secretary appealed the decision of the District Court directly to this Court and we noted probable jurisdiction. *Sub nom. Burnley* v. *Mid-America Pipeline Co.*, 488 U. S. 814 (1988). Because the District Court entered its judgment before September 25, 1988, the repeal of 28 U. S. C. § 1252 by Public Law 100–352, §1, 102 Stat. 662, does not affect our jurisdiction in this case. Appeals from district court judgments finding Acts of Congress unconstitutional and entered after the repealer's effective date, however, must now be taken to the appropriate federal court of appeals, pursuant to 28 U. S. C. § 1291.

II

Earlier this Term, in *Mistretta* v. *United States*, 488 U. S. 361 (1989), we revisited the nondelegation doctrine and reaffirmed our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could "'ascertain whether the will of Congress has been obeyed,'" no delegation of legislative authority trenching on the principle of separation of powers has occurred. *Id.*, at 379, quoting *Yakus* v. *United States*, 321

U. S. 414, 426 (1944). See *American Power & Light Co.* v. *SEC*, *supra*, at 105 (It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations").

Appellee Mid-America does not seriously contend that the guidelines provided by Congress to the Secretary in § 7005 do not meet the normal requirements of the nondelegation doctrine as we have applied it. Nor could Mid-America support any such contention. In enacting § 7005, Congress delimited the scope of the Secretary's discretion with much greater specificity than in delegations that we have upheld in the past. Cf. *Lichter* v. *United States*, 334 U. S. 742, 778–786 (1948) (upholding delegation of authority to War Department to recover "excessive profits" earned on military contracts); *Yakus*, *supra*, at 420, 426–427 (upholding delegation of authority to the Price Administrator to fix prices of commodities that "will be generally fair and equitable and will effectuate the purposes" of the congressional enactment); *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 600–601 (1944) (upholding delegation to Federal Power Commission to determine just and reasonable rates); *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 194, 225–226 (1943) (upholding delegation to the Federal Communications Commission to regulate broadcast licensing as "public interest, convenience, or necessity" require).

Under § 7005, the Secretary may not collect fees from firms not subject to either of the two Pipeline Safety Acts, § 7005(a)(3); he may not use the funds for purposes other than administering the two Acts, § 7005(c); he may not set fees on a case-by-case basis, § 7005(a); in setting fees, he may not apply any criteria other than volume-miles, miles, or revenues, § 7005(a); he may not establish a fee schedule that does not bear a "reasonable relationship" to these criteria,

§ 7005(a). Furthermore, the Secretary has no discretion whatsoever to expand the budget for administering the Pipeline Safety Acts because the ceiling on aggregate fees that may be collected in any fiscal year is set at 105 percent of the aggregate appropriations made by Congress for that fiscal year. § 7005(d). We have no doubt that these multiple restrictions Congress has placed on the Secretary's discretion to assess pipeline safety user fees satisfy the constitutional requirements of the nondelegation doctrine as we have previously articulated them.

Mid-America contends—and the District Court agreed—that, notwithstanding the constitutional soundness of § 7005 under ordinary nondelegation analysis, the assessment of these pipeline safety user fees must be scrutinized under a more exacting nondelegation lens. When so scrutinized, Mid-America argues, § 7005 is revealed to be constitutionally inadequate. In Mid-America's view, the assessments permitted by § 7005, although labeled "user fees," are actually tax assessments levied by the Secretary on firms regulated by the HLPSA or the NGPSA. Congress' taxing power, Mid-America further contends, unlike any of Congress' other enumerated powers, if delegable at all, must be delegated with much stricter guidelines than is required for other congressional delegations of authority. Mid-America purports to derive this two-tiered theory of nondelegation from the text and history of the Constitution, from past congressional practice, and from the decisions of this Court.

Article I, § 8, of the Constitution enumerates the powers of Congress. First in place among these enumerated powers is the "Power To lay and collect Taxes, Duties, Imposts and Excises . . . ." We discern nothing in this placement of the Taxing Clause that would distinguish Congress' power to tax from its other enumerated powers—such as its commerce powers, its power to "raise and support Armies," its power to borrow money, or its power to "make Rules for the Government"—in terms of the scope and degree of discretionary authority that Congress may delegate to the Executive in order that the President may "take Care that the Laws be faithfully executed." Art. II, § 3. See *J. W. Hampton, Jr., & Co.*, 276 U. S. 394 (1928) (upholding broad delegation of authority to the President under the Taxing Clause and the Commerce Clause to impose duties on foreign imports). It is, of course, true that "[a]ll Bills for raising Revenue [must] originate in the House of Representatives . . . ." Art. I, §7. But the Origination Clause, while embodying the Framers' concern that persons elected directly by the people have initial responsibility over taxation (until the ratification of the Seventeenth Amendment in 1913, Senators were chosen by state legislatures, see Art. I, §3), implies nothing about the scope of Congress' power to delegate discretionary authority under its taxing power once a tax bill has been properly enacted. Mid-America does not contend that § 7005 failed to originate in the House. The House Committee on Energy and Commerce drafted the provision, which was included in H. R. 3500, 99th Cong., 1st Sess. See H. R. Rep. No. 99–300, p. 492 (1985).

From its earliest days to the present, Congress, when enacting tax legislation, has varied the degree of specificity and the consequent degree of discretionary authority delegated to the Executive in such enactments. See, *e. g.*, Act of Mar. 3, 1791, ch. 15, § 43, 1 Stat. 209 (in the case of fines assessed for nonpayment of liquor taxes, "the secretary of the treasury of the United States [has] . . . power to mitigate or remit such penalty or forfeiture . . . upon such terms and conditions as shall appear to him reasonable") (First Congress); Act of July 6, 1797, ch. 11, §2, 1 Stat. 528 (in lieu of collecting stamp duty enacted by Congress, the Secretary of the Treasury may "agree to an annual composition for the amount of such stamp duty, with any of the said banks, of one per centum on the amount of the annual dividend made by such banks") (Fifth Congress). See generally *Field* v. *Clark*, 143 U. S. 649, 683–689 (1892) (longstanding practice of Congress delegating authority to the President under the Taxing Clause "is entitled to great weight").

Even when Congress legislates with remarkable specificity, as it has done in the Internal Revenue Code, it has delegated to the Executive the authority to "prescribe all needful rules and regulations for the enforcement of [the Code], including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue" and the authority to determine "the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect." 26 U. S. C. §§7805(a), (b). Such rules and regulations, which undoubtedly affect individual taxpayer liability, are equally without doubt the result of entirely appropriate delegations of discretionary authority by Congress. As we observed in *Bob Jones University* v. *United States*, 461 U. S. 574 (1983):

> "In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems. . . .
>
> "Congress, the source of IRS authority, can modify IRS rulings it considers improper; and courts exercise review over IRS actions. In the first instance, however, the responsibility for construing the [Internal Revenue] Code falls to the IRS. Since Congress cannot be expected to anticipate every conceivable problem that can arise or to carry out day-to-day oversight, it relies on the administrators and on the courts to implement the legislative will." *Id.*, at 596–597.

See also *National Muffler Dealers Assn., Inc.* v. *United States*, 440 U. S. 472, 488 (1979) ("The choice among reasonable interpretations [of the Internal Revenue Code] is for the Commissioner, not the courts").

We find no support, then, for Mid-America's contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power. In light of this conclusion, we need not concern ourselves with the threshold question that so exercised the District Court whether the pipeline safety users "fees" created by § 7005 are more properly thought of as a form of taxation because some of the administrative costs paid by the regulated parties actually inure to the benefit of the public rather than directly to the benefit of those parties. Even if the user fees are a form of taxation, we hold that the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges. Congress may wisely choose to be more circumspect in delegating authority under the Taxing Clause than under other of its enumerated powers, but this is not a heightened degree of prudence required by the Constitution.

Our decisions in *National Cable Television Assn., Inc.* v. *United States*, 415 U. S. 336 (1974), and *FPC* v. *New England Power Co.*, 415 U. S. 345 (1974), are not to the contrary. In these cases we considered the provision of the Independent Offices Appropriation Act (IOAA), 1952, 65 Stat. 290, recodified at 31 U. S. C. § 9701, that allows agencies to collect fees based on "(A) the costs to the Government; (B) the value of the service or thing to the recipient; (C) public policy or interest served; and (D) other relevant facts." 31 U. S. C. § 9701(b)(2). The Federal Communications Commission and the Federal Power Commission respectively sought to recoup all of their costs in regulating community antenna television systems and in administering the Federal Power Act and the Natural Gas Act by assessing fees on the regulated parties. Recognizing that some of the administrative costs at issue "inured to the benefit of the public," 415 U. S., at 343, rather than directly to the regulated parties, we expressed doubt whether Congress had clearly intended in the IOAA to delegate authority to Executive agencies to recover the costs of benefits conferred on the public by assessing fees on regulated parties. We observed that, because such fees do not "besto[w] a benefit on the [regulated party], not shared by other members of society," they might better be thought of as taxes rather than fees. Given at least the possibility of a constitutional difficulty arising from that delegation under the Taxing Clause, we chose to interpret the IOAA "narrowly to avoid constitutional problems." *Id.*, at 342. Accordingly, we struck down the agencies' efforts to recover from regulated parties costs for benefits inuring to the public generally.

In *FEA* v. *Algonquin SNG, Inc.*, 426 U. S. 548 (1976), we considered a nondelegation challenge to the Trade Expansion Act of 1962, 76 Stat. 872, which permitted the President to raise license "fees" on imports when necessary to protect the national security. In rejecting the challenge, we made clear that *National Cable Television* and *New England Power* stand only for the proposition that Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as "fees" or "taxes," on those parties. 426 U. S., at 560, n. 10. Of course, any such delegation must also meet the normal requirements of the nondelegation doctrine. As we have indicated, § 7005 explicitly reflects Congress' intention that the total costs of administering the HLPSA and the NGPSA be recovered through the assessment of charges on those regulated by the Acts and provides intelligible guidelines for these assessments. Finding no unconstitutional delegation of authority, we reverse the decision of the District Court.

It is so ordered.

FRANK, POSTMASTER GENERAL OF THE UNITED STATES, ET AL. *v.* MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

No. 87–1956. Argued March 22, 1989—Decided April 25, 1989

Appellee filed suit in the District Court to bar enforcement of 18 U. S. C. § 1302—which, *inter alia*, prohibits the mailing of any "publication of any kind . . . containing any list of the prizes drawn or awarded by means of" a lottery, gift enterprise, or scheme offering prizes dependent in whole or in part upon lot or chance—based on the First Amendment and the Due Process Clause of the Fifth Amendment. The court found § 1302 valid as applied to advertisements but unconstitutional as applied to prize lists. After appellants sought review of the ruling on prize lists, and appellee cross-appealed from the ruling on advertisements, Congress passed two laws affecting § 1302's coverage. The parties have agreed to dismiss the cross-appeal.

Held: The appeal on the issue whether § 1302 is constitutional as applied to prize lists is moot. Since appellants now take the position that the statute does not apply to the noncommercial publishing of prize lists, appellee is willing to forgo any further claim to the declaratory and equitable relief sought in its complaint. Thus, there is no longer any live controversy.

677 F. Supp. 1400, vacated and remanded.

Paul J. Larkin, Jr., argued the cause for appellants. With him on the briefs were former *Solicitor General Fried*, *Acting Solicitor General Bryson*, *Assistant Attorney General Bolton*, *Deputy Solicitor General Merrill*, and *Irene M. Solet*.

P. Cameron DeVore argued the cause for appellee. With him on the brief were *Mark R. Anfinson* and *Marshall J. Nelson*.*

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*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *John P. Borger*, *Robert Hicks*, and *Steven*

PER CURIAM.

We initially noted probable jurisdiction of an appeal and a cross-appeal in this matter. 488 U. S. 815 (1988). Appellee filed suit in District Court to bar enforcement of 18 U. S. C. § 1302, based on the First Amendment and the Due Process Clause of the Fifth Amendment. The suit sought declaratory and injunctive relief against the Postmaster General, among others. Section 1302 prohibits the mailing of any "publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme." The District Court found § 1302 valid as applied to advertisements, but unconstitutional as applied to prize lists, because the statute could prevent the publication of prize lists in news reports. The District Court granted an injunction limited to the latter issue. *Minnesota Newspaper Assn., Inc.* v. *Postmaster General*, 677 F. Supp. 1400 (Minn. 1987). Appellants sought review of the ruling on prize lists, and appellee cross-appealed from the ruling on advertisements.

After the Court had noted probable jurisdiction of both appeals, Congress passed two laws affecting the coverage of § 1302. Charity Games Advertising Clarification Act of 1988, § 2(a), Pub. L. 100–625, 102 Stat. 3205 (Nov. 7, 1988); Indian Gaming Regulatory Act, § 21, Pub. L. 100–497, 102 Stat. 2486 (Oct. 17, 1988). Although the first statute does not take effect until May 7, 1990, the parties agreed to dismiss the cross-appeal under this Court's Rule 53. *Minnesota Newspaper Assn., Inc.* v. *Postmaster General*, 488 U. S. 998 (1989).

R. Shapiro; and for the Association of National Advertisers by *Burt Neuborne* and *Gilbert H. Weil.*

P. Cameron DeVore, Marshall J. Nelson, W. Terry Maguire, René P. Milam, Charles V. Hamm, and *Jeanne S. Whiteing* filed a brief for the American Newspaper Publishers Association et al. as *amici curiae.*

In this Court, appellants now take the position that the statute does not apply to the noncommercial publishing of prize lists. Brief for Appellants 12, 14–30. In light of this concession, appellee, the original plaintiff in the case, states its willingness to forgo any further claim to the declaratory and equitable relief sought in its complaint. In these circumstances, we conclude that there is no longer any live controversy on the issue whether the statute is constitutional as it applies to prize lists, and that this appeal is moot. There is no justification for our retaining jurisdiction of a civil case where no real controversy is before us. *Deakins* v. *Monaghan*, 484 U. S. 193, 200–201 (1988). We therefore vacate the judgment below and remand for the District Court to dismiss the portions of the complaint remaining at issue on this appeal. See *id.*, at 200; *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39–40 (1950).

It is so ordered.

JUSTICE WHITE and JUSTICE MARSHALL dissent.

JUSTICE STEVENS, dissenting.

In my opinion appellants' concession is a reason for affirming, rather than vacating, the judgment of the District Court insofar as it enjoins the Postmaster General from enforcing 18 U. S. C. § 1302 as applied to prize lists. I therefore respectfully dissent.

PRICE WATERHOUSE *v.* HOPKINS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1167. Argued October 31, 1988—Decided May 1, 1989

Respondent was a senior manager in an office of petitioner professional accounting partnership when she was proposed for partnership in 1982. She was neither offered nor denied partnership but instead her candidacy was held for reconsideration the following year. When the partners in her office later refused to repropose her for partnership, she sued petitioner in Federal District Court under Title VII of the Civil Rights Act of 1964, charging that it had discriminated against her on the basis of sex in its partnership decisions. The District Court ruled in respondent's favor on the question of liability, holding that petitioner had unlawfully discriminated against her on the basis of sex by consciously giving credence and effect to partners' comments about her that resulted from sex stereotyping. The Court of Appeals affirmed. Both courts held that an employer who has allowed a discriminatory motive to play a part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination, and that petitioner had not carried this burden.

Held: The judgment is reversed, and the case is remanded.

263 U. S. App. D. C. 321, 825 F. 2d 458, reversed and remanded.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, concluded that when a plaintiff in a Title VII case proves that her gender played a part in an employment decision, the defendant may avoid a finding of liability by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account. The courts below erred by requiring petitioner to make its proof by clear and convincing evidence. Pp. 237–258.

(a) The balance between employee rights and employer prerogatives established by Title VII by eliminating certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice is decisive in this case. The words "because of" in § 703(a)(1) of the Act, which forbids an employer to make an adverse decision against an employee "because of such individual's . . . sex," requires looking at *all* of the reasons, both legitimate and illegitimate, contributing to the decision *at the time it is made.* The preservation of employers' freedom of choice means that an employer will not be liable if it can prove that, if it had not taken gender into account, it would have come to the same decision. This Court's prior decisions demonstrate that the plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision thereby places the burden on the defendant to show that it would have made the same decision in the absence of the unlawful motive. Here, petitioner may not meet its burden by merely showing that respondent's interpersonal problems—abrasiveness with staff members—constituted a legitimate reason for denying her partnership; instead, petitioner must show that its legitimate reason, standing alone, would have induced petitioner to deny respondent partnership. Pp. 239–252.

(b) Conventional rules of civil litigation generally apply in Title VII cases, and one of these rules is that the parties need only prove their case by a preponderance of the evidence. Pp. 252–255.

(c) The District Court's finding that sex stereotyping was permitted to play a part in evaluating respondent as a candidate for partnership was not clearly erroneous. This finding is not undermined by the fact that many of the suspect comments made about respondent were made by partners who were supporters rather than detractors. Pp. 255–258.

JUSTICE WHITE, although concluding that the Court of Appeals erred in requiring petitioner to prove by clear and convincing evidence that it would have reached the same employment decision in the absence of the improper motive, rather than merely requiring proof by a preponderance of the evidence as in *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, which sets forth the proper approach to causation in this case, also concluded that the plurality here errs in seeming to require, at least in most cases, that the employer carry its burden by submitting objective evidence that the same result would have occurred absent the unlawful motivation. In a mixed-motives case, where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof, and there is no special requirement of objective evidence. This would even more plainly be the case where the employer denies any illegitimate motive in the first place but the court finds that illegitimate, as well as legitimate, factors motivated the adverse action. Pp. 258–261.

JUSTICE O'CONNOR, although agreeing that on the facts of this case, the burden of persuasion should shift to petitioner to demonstrate by a preponderance of the evidence that it would have reached the same decision absent consideration of respondent's gender, and that this burden shift is properly part of the liability phase of the litigation, concluded that the plurality misreads Title VII's substantive causation requirement to *command* burden shifting if the employer's decisional process is "tainted" by awareness of sex or race in any way, and thereby effectively eliminates the requirement. JUSTICE O'CONNOR also concluded that the burden shifting rule should be limited to cases such as the present in which the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion. Pp. 261–279.

(a) Contrary to the plurality's conclusion, Title VII's plain language making it unlawful for an employer to undertake an adverse employment action "because of" prohibited factors and the statute's legislative history demonstrate that a substantive violation only occurs when consideration of an illegitimate criterion is the "but-for" cause of the adverse action. However, nothing in the language, history, or purpose of the statute prohibits adoption of an evidentiary rule which places the burden of persuasion on the defendant to demonstrate that legitimate concerns would have justified an adverse employment action where the plaintiff has convinced the factfinder that a forbidden factor played a substantial role in the employment decision. Such a rule has been adopted in tort and other analogous types of cases, where leaving the burden of proof on the plaintiff to prove "but-for" causation would be unfair or contrary to the deterrent purposes embodied in the concept of duty of care. Pp. 262–269.

(b) Although the burden shifting rule adopted here departs from the careful framework established by *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, and *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248—which clearly contemplate that an individual disparate treatment plaintiff bears the burden of persuasion throughout the litigation—that departure is justified in cases such as the present where the plaintiff, having presented direct evidence that the employer placed substantial, though unquantifiable, reliance on a forbidden factor in making an employment decision, has taken her proof as far as it could go, such that it is appropriate to require the defendant, which has created the uncertainty as to causation by considering the illegitimate criterion, to show that its decision would have been justified by wholly legitimate concerns. Moreover, a rule shifting the burden in these circumstances will not conflict with other Title VII policies, particularly its prohibition on preferential treatment based on prohibited factors. *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, distinguished. Pp. 270–276.

(c) Thus, in order to justify shifting the burden on the causation issue to the defendant, a disparate treatment plaintiff must show by direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision. Such a showing entitles the factfinder to presume that the employer's discriminatory animus made a difference in the outcome, and, if the employer fails to carry its burden of persuasion, to conclude that the employer's decision was made "because of" consideration of the illegitimate factor, thereby satisfying the substantive standard for liability under Title VII. This burden shifting rule supplements the *McDonnell Douglas-Burdine* framework, which continues to apply where the plaintiff has failed to satisfy the threshold standard set forth herein. Pp. 276–279.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined. WHITE, J., *post*, p. 258, and O'CONNOR, J., *post*, p. 261, filed opinions concurring in the judgment. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 279.

Kathryn A. Oberly argued the cause for petitioner. With her on the briefs were *Paul M. Bator*, *Douglas A. Poe*, *Eldon Olson*, and *Ulric R. Sullivan*.

James H. Heller argued the cause for respondent. With him on the brief was *Douglas B. Huron*.*

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join.

Ann Hopkins was a senior manager in an office of Price Waterhouse when she was proposed for partnership in 1982. She was neither offered nor denied admission to the partnership; instead, her candidacy was held for reconsideration the following year. When the partners in her office later re-

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**Robert E. Williams* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Marsha S. Berzon* and *Laurence Gold;* for the American Psychological Association by *Donald N. Bersoff;* for the Committees on Civil Rights, Labor and Employment Law, and Sex and Law of the Association of the Bar of the City of New York by *Jonathan Lang*, *Eugene S. Friedman*, *Arthur Leonard*, and *Colleen McMahon;* and for the NOW Legal Defense and Education Fund et al. by *Sarah E. Burns*, *Lynn Hecht Schafran*, *Joan E. Bertin*, *John A. Powell*, and *Donna R. Lenhoff*.

Solicitor General Fried, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Merrill*, *Deputy Assistant Attorney General Clegg*, *Brian J. Martin*, and *David K. Flynn* filed a brief for the United States as *amicus curiae*.

fused to repropose her for partnership, she sued Price Waterhouse under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, charging that the firm had discriminated against her on the basis of sex in its decisions regarding partnership. Judge Gesell in the Federal District Court for the District of Columbia ruled in her favor on the question of liability, 618 F. Supp. 1109 (1985), and the Court of Appeals for the District of Columbia Circuit affirmed. 263 U. S. App. D. C. 321, 825 F. 2d 458 (1987). We granted certiorari to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives. 485 U. S. 933 (1988).

I

At Price Waterhouse, a nationwide professional accounting partnership, a senior manager becomes a candidate for partnership when the partners in her local office submit her name as a candidate. All of the other partners in the firm are then invited to submit written comments on each candidate—either on a "long" or a "short" form, depending on the partner's degree of exposure to the candidate. Not every partner in the firm submits comments on every candidate. After reviewing the comments and interviewing the partners who submitted them, the firm's Admissions Committee makes a recommendation to the Policy Board. This recommendation will be either that the firm accept the candidate for partnership, put her application on "hold," or deny her the promotion outright. The Policy Board then decides whether to submit the candidate's name to the entire partnership for a vote, to "hold" her candidacy, or to reject her. The recommendation of the Admissions Committee, and the decision of the Policy Board, are not controlled by fixed guidelines: a certain number of positive comments from partners will not guarantee a candidate's admission to the partnership, nor will a specific quantity of negative comments necessarily defeat her application. Price Waterhouse places no limit on the number of persons whom it will admit to the partnership in any given year.

Ann Hopkins had worked at Price Waterhouse's Office of Government Services in Washington, D. C., for five years when the partners in that office proposed her as a candidate for partnership. Of the 662 partners at the firm at that time, 7 were women. Of the 88 persons proposed for partnership that year, only 1—Hopkins—was a woman. Forty-seven of these candidates were admitted to the partnership, 21 were rejected, and 20—including Hopkins—were "held" for reconsideration the following year.[1] Thirteen of the 32 partners who had submitted comments on Hopkins supported her bid for partnership. Three partners recommended that her candidacy be placed on hold, eight stated that they did not have an informed opinion about her, and eight recommended that she be denied partnership.

In a jointly prepared statement supporting her candidacy, the partners in Hopkins' office showcased her successful 2-year effort to secure a $25 million contract with the Department of State, labeling it "an outstanding performance" and one that Hopkins carried out "virtually at the partner level." Plaintiff's Exh. 15. Despite Price Waterhouse's attempt at trial to minimize her contribution to this project, Judge Gesell specifically found that Hopkins had "played a key role in Price Waterhouse's successful effort to win a multi-million dollar contract with the Department of State." 618 F. Supp., at 1112. Indeed, he went on, "[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership." *Ibid.*

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[1] Before the time for reconsideration came, two of the partners in Hopkins' office withdrew their support for her, and the office informed her that she would not be reconsidered for partnership. Hopkins then resigned. Price Waterhouse does not challenge the Court of Appeals' conclusion that the refusal to repropose her for partnership amounted to a constructive discharge. That court remanded the case to the District Court for further proceedings to determine appropriate relief, and those proceedings have been stayed pending our decision. Brief for Petitioner 15, n. 3. We are concerned today only with Price Waterhouse's decision to place Hopkins' candidacy on hold. Decisions pertaining to advancement to partnership are, of course, subject to challenge under Title VII. *Hishon* v. *King & Spalding*, 467 U. S. 69 (1984).

The partners in Hopkins' office praised her character as well as her accomplishments, describing her in their joint statement as "an outstanding professional" who had a "deft touch," a "strong character, independence and integrity." Plaintiff's Exh. 15. Clients appear to have agreed with these assessments. At trial, one official from the State Department described her as "extremely competent, intelligent," "strong and forthright, very productive, energetic and creative." Tr. 150. Another high-ranking official praised Hopkins' decisiveness, broadmindedness, and "intellectual clarity"; she was, in his words, "a stimulating conversationalist." *Id.*, at 156–157. Evaluations such as these led Judge Gesell to conclude that Hopkins "had no difficulty dealing with clients and her clients appear to have been very pleased with her work" and that she "was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked." 618 F. Supp., at 1112–1113.

On too many occasions, however, Hopkins' aggressiveness apparently spilled over into abrasiveness. Staff members seem to have borne the brunt of Hopkins' brusqueness. Long before her bid for partnership, partners evaluating her work had counseled her to improve her relations with staff members. Although later evaluations indicate an improvement, Hopkins' perceived shortcomings in this important area eventually doomed her bid for partnership. Virtually all of the partners' negative remarks about Hopkins—even those of partners supporting her—had to do with her "interpersonal skills." Both "[s]upporters and opponents of her candidacy," stressed Judge Gesell, "indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff." *Id.*, at 1113.

There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as "macho" (Defendant's Exh. 30); another suggested that she "overcompensated for being a woman" (Defendant's Exh. 31); a third advised her to take "a course at charm school" (Defendant's Exh. 27). Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only "because it's a lady using foul language." Tr. 321. Another supporter explained that Hopkins "ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate." Defendant's Exh. 27. But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the *coup de grace:* in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 618 F. Supp., at 1117.

Dr. Susan Fiske, a social psychologist and Associate Professor of Psychology at Carnegie-Mellon University, testified at trial that the partnership selection process at Price Waterhouse was likely influenced by sex stereotyping. Her testimony focused not only on the overtly sex-based comments of partners but also on gender-neutral remarks, made by partners who knew Hopkins only slightly, that were intensely critical of her. One partner, for example, baldly stated that Hopkins was "universally disliked" by staff (Defendant's Exh. 27), and another described her as "consistently annoying and irritating" *(ibid.);* yet these were people who had had very little contact with Hopkins. According to

Fiske, Hopkins' uniqueness (as the only woman in the pool of candidates) and the subjectivity of the evaluations made it likely that sharply critical remarks such as these were the product of sex stereotyping—although Fiske admitted that she could not say with certainty whether any particular comment was the result of stereotyping. Fiske based her opinion on a review of the submitted comments, explaining that it was commonly accepted practice for social psychologists to reach this kind of conclusion without having met any of the people involved in the decisionmaking process.

In previous years, other female candidates for partnership also had been evaluated in sex-based terms. As a general matter, Judge Gesell concluded, "[c]andidates were viewed favorably if partners believed they maintained their femin[in]ity while becoming effective professional managers"; in this environment, "[t]o be identified as a 'women's lib[b]er' was regarded as [a] negative comment." 618 F. Supp., at 1117. In fact, the judge found that in previous years "[o]ne partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers—yet the firm took no action to discourage his comments and recorded his vote in the overall summary of the evaluations." *Ibid.*

Judge Gesell found that Price Waterhouse legitimately emphasized interpersonal skills in its partnership decisions, and also found that the firm had not fabricated its complaints about Hopkins' interpersonal skills as a pretext for discrimination. Moreover, he concluded, the firm did not give decisive emphasis to such traits only because Hopkins was a woman; although there were male candidates who lacked these skills but who were admitted to partnership, the judge found that these candidates possessed other, positive traits that Hopkins lacked.

The judge went on to decide, however, that some of the partners' remarks about Hopkins stemmed from an impermissibly cabined view of the proper behavior of women, and that Price Waterhouse had done nothing to disavow reliance on such comments. He held that Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping. Noting that Price Waterhouse could avoid equitable relief by proving by clear and convincing evidence that it would have placed Hopkins' candidacy on hold even absent this discrimination, the judge decided that the firm had not carried this heavy burden.

The Court of Appeals affirmed the District Court's ultimate conclusion, but departed from its analysis in one particular: it held that even if a plaintiff proves that discrimination played a role in an employment decision, the defendant will not be found liable if it proves, by clear and convincing evidence, that it would have made the same decision in the absence of discrimination. 263 U. S. App. D. C., at 333–334, 825 F. 2d, at 470–471. Under this approach, an employer is not deemed to have violated Title VII if it proves that it would have made the same decision in the absence of an impermissible motive, whereas under the District Court's approach, the employer's proof in that respect only avoids equitable relief. We decide today that the Court of Appeals had the better approach, but that both courts erred in requiring the employer to make its proof by clear and convincing evidence.

II

The specification of the standard of causation under Title VII is a decision about the kind of conduct that violates that statute. According to Price Waterhouse, an employer violates Title VII only if it gives decisive consideration to an employee's gender, race, national origin, or religion in making a decision that affects that employee. On Price Waterhouse's theory, even if a plaintiff shows that her gender played a part in an employment decision, it is still her burden to show that the decision would have been different if the employer had not discriminated. In Hopkins' view, on the other hand, an employer violates the statute whenever it allows one of these attributes to play any part in an employment decision. Once a plaintiff shows that this occurred, according to Hopkins, the employer's proof that it would have made the same decision in the absence of discrimination can serve to limit equitable relief but not to avoid a finding of liability.[2] We conclude that, as often happens, the truth lies somewhere in between.

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[2] This question has, to say the least, left the Circuits in disarray. The Third, Fourth, Fifth, and Seventh Circuits require a plaintiff challenging an adverse employment decision to show that, but for her gender (or race or religion or national origin), the decision would have been in her favor. See, *e. g.*, *Bellissimo* v. *Westinghouse Electric Corp.*, 764 F. 2d 175, 179 (CA3 1985), cert. denied, 475 U. S. 1035 (1986); *Ross* v. *Communications Satellite Corp.*, 759 F. 2d 355, 365–366 (CA4 1985); *Peters* v. *Shreveport*, 818 F. 2d 1148, 1161 (CA5 1987); *McQuillen* v. *Wisconsin Education Assn. Council*, 830 F. 2d 659, 664–665 (CA7 1987). The First, Second, Sixth, and Eleventh Circuits, on the other hand, hold that once the plaintiff has shown that a discriminatory motive was a "substantial" or "motivating" factor in an employment decision, the employer may avoid a finding of liability only by proving that it would have made the same decision even in the absence of discrimination. These courts have either specified that the employer must prove its case by a preponderance of the evidence or have not mentioned the proper standard of proof. See, *e. g.*, *Fields* v. *Clark University*, 817 F. 2d 931, 936–937 (CA1 1987) ("motivating factor"); *Berl* v. *Westchester County*, 849 F. 2d 712, 714–715 (CA2 1988) ("substantial part"); *Terbovitz* v. *Fiscal Court of Adair County, Ky.*, 825 F. 2d 111, 115 (CA6 1987) ("motivating factor"); *Bell* v. *Birmingham Linen Service*, 715 F. 2d 1552, 1557 (CA11 1983). The Court of Appeals for the District of Columbia Circuit, as shown in this case, follows the same rule except that it requires that the employer's proof be clear and convincing rather than merely preponderant. 263 U. S. App. D. C. 321, 333–334, 825 F. 2d 458, 470–471 (1987); see also *Toney* v. *Block*, 227 U. S. App. D. C. 273, 275, 705 F. 2d 1364, 1366 (1983) (Scalia, J.) (it would be "destructive of the purposes of [Title VII] to require the plaintiff to establish . . . the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor"). The Court of Appeals for the Ninth Circuit also requires clear and convincing proof, but it goes further by holding that a Title VII violation is made out as soon as the plaintiff shows that an impermissible motivation played a part in an employment

A

In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees.[3] Yet, the statute does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions. The converse, therefore, of "for cause" legislation,[4] Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice. This balance between employee rights and employer prerogatives turns out to be decisive in the case before us.

Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now-familiar language, the statute forbids

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decision—at which point the employer may avoid reinstatement and an award of backpay by proving that it would have made the same decision in the absence of the unlawful motive. See, *e. g. Fadhl* v. *City and County of San Francisco*, 741 F. 2d 1163, 1165–1166 (1984) (Kennedy, J.) ("significant factor"). Last, the Court of Appeals for the Eighth Circuit draws the same distinction as the Ninth between the liability and remedial phases of Title VII litigation, but requires only a preponderance of the evidence from the employer. See, *e. g.*, *Bibbs* v. *Block*, 778 F. 2d 1318, 1320–1324 (1985) (en banc) ("discernible factor").

[3] We disregard, for purposes of this discussion, the special context of affirmative action.

[4] Congress specifically declined to require that an employment decision have been "for cause" in order to escape an affirmative penalty (such as reinstatement or backpay) from a court. As introduced in the House, the bill that became Title VII forbade such affirmative relief if an "individual was . . . refused employment or advancement, or was suspended or discharged *for cause*." H. R. Rep. No. 7152, 88th Cong., 1st Sess., 77 (1963) (emphasis added). The phrase "for cause" eventually was deleted in favor of the phrase "for any reason other than" one of the enumerated characteristics. See 110 Cong. Rec. 2567–2571 (1964). Representative Celler explained that this substitution "specif[ied] cause"; in his view, a court "cannot find any violation of the act which is based on facts other . . . than discrimination on the grounds of race, color, religion, or national origin." *Id.*, at 2567.

an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's . . . sex." 42 U. S. C. §§ 2000e-2(a)(1), (2) (emphasis added).[5] We take these words to mean that gender must be irrelevant to employment decisions. To construe the words "because of" as colloquial shorthand for "but-for causation," as does Price Waterhouse, is to misunderstand them.[6]

But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way. The present, active tense of the operative verbs of § 703(a)(1) ("to fail or refuse"), in contrast, turns our attention to the actual moment of the event in question, the adverse employment decision. The critical inquiry, the one commanded by the words of § 703(a)(1), is whether gender was a factor in the employment decision *at the moment it was made.* Moreover, since we know that the words "because of" do not mean "*solely* because of,"[7] we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was "because of" sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.

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[5] In this Court, Hopkins for the first time argues that Price Waterhouse violated § 703(a)(2) when it subjected her to a biased decisionmaking process that "tended to deprive" a woman of partnership on the basis of her sex. Since Hopkins did not make this argument below, we do not address it.

[6] We made passing reference to a similar question in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U. S. 273, 282, n. 10 (1976), where we stated that when a Title VII plaintiff seeks to show that an employer's explanation for a challenged employment decision is pretextual, "no more is required to be shown than that race was a 'but for' cause." This passage, however, does not suggest that the plaintiff *must* show but-for cause; it indicates only that if she does so, she prevails. More important, *McDonald* dealt with the question whether the employer's stated reason for its decision was *the* reason for its action; unlike the case before us today, therefore, *McDonald* did not involve mixed motives. This difference is decisive in distinguishing this case from those involving "pretext." See *infra*, at 247, n. 12.

To attribute this meaning to the words "because of" does not, as the dissent asserts, *post,* at 282, divest them of causal significance. A simple example illustrates the point. Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it, *neither* physical force was a "cause" of the motion unless we can show that but for one or both of them, the object would not have moved; apparently both forces were simply "in the air" unless we can identify at least one of them as a but-for cause of the object's movement. *Ibid.* Events that are causally overdetermined, in other words, may not have any "cause" at all. This cannot be so.

We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words "because of," Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.

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[7] Congress specifically rejected an amendment that would have placed the word "solely" in front of the words "because of." 110 Cong. Rec. 2728, 13837 (1964).

Our interpretation of the words "because of" also is supported by the fact that Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a "bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise." 42 U. S. C. §2000e–2(e). The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her. Indeed, Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities. An employer may not, we have held, condition employment opportunities on the satisfaction of facially neutral tests or qualifications that have a disproportionate, adverse impact on members of protected groups when those tests or qualifications are not required for performance of the job. See *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977 (1988); *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971).

To say that an employer may not take gender into account is not, however, the end of the matter, for that describes only one aspect of Title VII. The other important aspect of the statute is its preservation of an employer's remaining freedom of choice. We conclude that the preservation of this freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person. The statute's maintenance of employer prerogatives is evident from the statute itself and from its history, both in Congress and in this Court.

To begin with, the existence of the BFOQ exception shows Congress' unwillingness to require employers to change the very nature of their operations in response to the statute. And our emphasis on "business necessity" in disparate-impact cases, see *Watson* and *Griggs*, and on "legitimate, nondiscriminatory reason[s]" in disparate-treatment cases, see *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973); *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981), results from our awareness of Title VII's balance between employee rights and employer prerogatives. In *McDonnell Douglas*, we described as follows Title VII's goal to eradicate discrimination while preserving workplace efficiency: "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise." 411 U. S., at 801.

When an employer ignored the attributes enumerated in the statute, Congress hoped, it naturally would focus on the qualifications of the applicant or employee. The intent to drive employers to focus on qualifications rather than on race, religion, sex, or national origin is the theme of a good deal of the statute's legislative history. An interpretive memorandum entered into the Congressional Record by Senators Case and Clark, comanagers of the bill in the Senate, is representative of this general theme.[8] According to their memorandum, Title VII "'expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.'"[9] 110 Cong. Rec. 7247 (1964), quoted in *Griggs* v.

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[8] We have in the past acknowledged the authoritativeness of this interpretive memorandum, written by the two bipartisan "captains" of Title VII. See, *e. g.*, *Firefighters* v. *Stotts*, 467 U. S. 561, 581, n. 14 (1984).

[9] Many of the legislators' statements, such as the memorandum quoted in text, focused specifically on race rather than on gender or religion or national origin. We do not, however, limit their statements to the context of

Duke Power Co., *supra*, at 434. The memorandum went on: "To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title." 110 Cong. Rec. 7213 (1964).

Many other legislators made statements to a similar effect; we see no need to set out each remark in full here. The central point is this: while an employer may not take gender into account in making an employment decision (except in those very narrow circumstances in which gender is a BFOQ), it is free to decide against a woman for other reasons. We think these principles require that, once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability[10] only by proving that it would have made the same

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race, but instead we take them as general statements on the meaning of Title VII. The somewhat bizarre path by which "sex" came to be included as a forbidden criterion for employment—it was included in an attempt to *defeat* the bill, see C. & B. Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act 115–117 (1985)—does not persuade us that the legislators' statements pertaining to race are irrelevant to cases alleging gender discrimination. The amendment that added "sex" as one of the forbidden criteria for employment was passed, of course, and the statute on its face treats each of the enumerated categories exactly the same.

By the same token, our specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin.

[10] Hopkins argues that once she made this showing, she was entitled to a finding that Price Waterhouse had discriminated against her on the basis of sex; as a consequence, she says, the partnership's proof could only limit the relief she received. She relies on Title VII's § 706(g), which permits a court to award affirmative relief when it finds that an employer "has intentionally engaged in or is intentionally engaging in an unlawful employment practice," and yet forbids a court to order reinstatement of, or backpay to, "an individual . . . if such individual was refused . . . employment or ad-

decision even if it had not allowed gender to play such a role. This balance of burdens is the direct result of Title VII's balance of rights.

Our holding casts no shadow on *Burdine*, in which we decided that, even after a plaintiff has made out a prima facie case of discrimination under Title VII, the burden of persuasion does not shift to the employer to show that its stated legitimate reason for the employment decision was the true reason. 450 U. S., at 256–258. We stress, first, that nei-

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vancement or was suspended or discharged *for any reason other than* discrimination on account of race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–5(g) (emphasis added). We do not take this provision to mean that a court inevitably can find a violation of the statute without having considered whether the employment decision would have been the same absent the impermissible motive. That would be to interpret § 706(g)—a provision defining *remedies*—to influence the substantive commands of the statute. We think that this provision merely limits courts' authority to award affirmative relief in those circumstances in which a violation of the statute is not dependent upon the effect of the employer's discriminatory practices on a particular employee, as in pattern-or-practice suits and class actions. "The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while 'at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking.'" *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U. S. 867, 876 (1984), quoting *Teamsters* v. *United States*, 431 U. S. 324, 360, n. 46 (1977).

Without explicitly mentioning this portion of § 706(g), we have in the past held that Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect. See *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 772 (1976); *Teamsters* v. *United States*, *supra*, at 367–371; *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U. S. 395, 404, n. 9 (1977). These decisions suggest that the proper focus of § 706(g) is on claims of systemic discrimination, not on charges of individual discrimination. Cf. *NLRB* v. *Transportation Management Corp.*, 462 U. S. 393 (1983) (upholding the National Labor Relations Board's identical interpretation of § 10(c) of the National Labor Relations Act, 29 U. S. C. § 160(c), which contains language almost identical to § 706(g)).

ther court below shifted the burden of persuasion to Price Waterhouse on this question, and in fact, the District Court found that Hopkins had not shown that the firm's stated reason for its decision was pretextual. 618 F. Supp., at 1114–1115. Moreover, since we hold that the plaintiff retains the burden of persuasion on the issue whether gender played a part in the employment decision, the situation before us is not the one of "shifting burdens" that we addressed in *Burdine*. Instead, the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another. See *NLRB* v. *Transportation Management Corp.*, 462 U. S. 393, 400 (1983).[11]

Price Waterhouse's claim that the employer does not bear any burden of proof (if it bears one at all) until the plaintiff has shown "substantial evidence that Price Waterhouse's explanation for failing to promote Hopkins was not the 'true reason' for its action" (Brief for Petitioner 20) merely restates its argument that the plaintiff in a mixed-motives case must squeeze her proof into *Burdine*'s framework. Where a decision was the product of a mixture of legitimate and illegitimate motives, however, it simply makes no sense to ask whether the legitimate reason was "*the* 'true reason'" (Brief for Petitioner 20 (emphasis added)) for the decision—which is the question asked by *Burdine*. See *Transportation Management*, *supra*, at 400, n. 5.[12] Oblivious to this last point, the dissent would insist that *Burdine*'s framework perform work that it was never intended to perform. It would require a plaintiff who challenges an adverse employment decision in which both legitimate and illegitimate considerations played a part to pretend that the decision, in fact, stemmed from a single source—for the premise of *Burdine* is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision. To say that *Burdine*'s evidentiary scheme will not help us decide a case admittedly involving *both* kinds of considerations is not to cast aspersions on the utility of that scheme in the circumstances for which it was designed.

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[11] Given that both the plaintiff and defendant bear a burden of proof in cases such as this one, it is surprising that the dissent insists that our approach requires the employer to bear "the ultimate burden of proof." *Post*, at 288. It is, moreover, perfectly consistent to say *both* that gender was a factor in a particular decision when it was made *and* that, when the situation is viewed hypothetically and after the fact, the same decision would have been made even in the absence of discrimination. Thus, we do not see the "internal inconsistency" in our opinion that the dissent perceives. See *post*, at 285–286. Finally, where liability is imposed because an employer is unable to prove that it would have made the same decision even if it had not discriminated, this is not an imposition of liability "where sex made no difference to the outcome." *Post*, at 285. In our adversary system, where a party has the burden of proving a particular assertion and where that party is unable to meet its burden, we assume that that assertion is inaccurate. Thus, where an employer is unable to prove its claim that it would have made the same decision in the absence of discrimination, we are entitled to conclude that gender *did* make a difference to the outcome.

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[12] Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a "pretext" case or a "mixed-motives" case from the beginning in the District Court; indeed, we expect that plaintiffs often will allege, in the alternative, that their cases are both. Discovery often will be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision against her. At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives. If the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following *Burdine*, that the employer's stated reason for its decision is pretextual. The dissent need not worry that this evidentiary scheme, if used during a jury trial, will be so impossibly confused and complex as it imagines. See, *e. g.*, *post*, at 292. Juries long have decided cases in which defendants raised affirmative defenses. The dissent fails, moreover, to explain why the evidentiary scheme that we endorsed over 10 years ago in *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977), has not proved unworkable in that context but would be hopelessly complicated in a case brought under federal antidiscrimination statutes.

B

In deciding as we do today, we do not traverse new ground. We have in the past confronted Title VII cases in which an employer has used an illegitimate criterion to distinguish among employees, and have held that it is the employer's burden to justify decisions resulting from that practice. When an employer has asserted that gender is a BFOQ within the meaning of § 703(e), for example, we have assumed that it is the employer who must show why it must use gender as a criterion in employment. See *Dothard* v. *Rawlinson*, 433 U. S. 321, 332–337 (1977). In a related context, although the Equal Pay Act expressly permits employers to pay different wages to women where disparate pay is the result of a "factor other than sex," see 29 U. S. C. § 206(d)(1), we have decided that it is the employer, not the employee, who must prove that the actual disparity is not sex linked. See *Corning Glass Works* v. *Brennan*, 417 U. S. 188, 196 (1974). Finally, some courts have held that, under Title VII as amended by the Pregnancy Discrimination Act, it is the employer who has the burden of showing that its limitations on the work that it allows a pregnant woman to perform are necessary in light of her pregnancy. See, *e. g.*, *Hayes* v. *Shelby Memorial Hospital*, 726 F. 2d 1543, 1548 (CA11 1984); *Wright* v. *Olin Corp.*, 697 F. 2d 1172, 1187 (CA4 1982). As these examples demonstrate, our assumption always has been that if an employer allows gender to affect its decisionmaking process, then it must carry the burden of justifying its ultimate decision. We have not in the past required women whose gender has proved relevant to an employment decision to establish the negative proposition that they would not have been subject to that decision had they been men, and we do not do so today.

We have reached a similar conclusion in other contexts where the law announces that a certain characteristic is irrelevant to the allocation of burdens and benefits. In *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977), the plaintiff claimed that he had been discharged as a public school teacher for exercising his free-speech rights under the First Amendment. Because we did not wish to "place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing," *id.*, at 285, we concluded that such an employee "ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record." *Id.*, at 286. We therefore held that once the plaintiff had shown that his constitutionally protected speech was a "substantial" or "motivating factor" in the adverse treatment of him by his employer, the employer was obligated to prove "by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff] even in the absence of the protected conduct." *Id.*, at 287. A court that finds for a plaintiff under this standard has effectively concluded that an illegitimate motive was a "but-for" cause of the employment decision. See *Givhan* v. *Western Line Consolidated School Dist.*, 439 U. S. 410, 417 (1979). See also *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 270–271, n. 21 (1977) (applying *Mt. Healthy* standard where plaintiff alleged that unconstitutional motive had contributed to enactment of legislation); *Hunter* v. *Underwood*, 471 U. S. 222, 228 (1985) (same).

In *Transportation Management*, we upheld the NLRB's interpretation of § 10(c) of the National Labor Relations Act, which forbids a court to order affirmative relief for discriminatory conduct against a union member "if such individual was suspended or discharged for cause." 29 U. S. C. § 160(c). The Board had decided that this provision meant that once an employee had shown that his suspension or discharge was based in part on hostility to unions, it was up to the employer to prove by a preponderance of the evidence that it would have made the same decision in the absence of this impermissible motive. In such a situation, we emphasized, "[t]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing." 462 U. S., at 403.

We have, in short, been here before. Each time, we have concluded that the plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive. Our decision today treads this well-worn path.

C

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.[13] In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.

Although the parties do not overtly dispute this last proposition, the placement by Price Waterhouse of "sex stereotyping" in quotation marks throughout its brief seems to us an insinuation either that such stereotyping was not present in this case or that it lacks legal relevance. We reject both possibilities. As to the existence of sex stereotyping in this case, we are not inclined to quarrel with the District Court's conclusion that a number of the partners' comments showed sex stereotyping at work. See *infra*, at 255–256. As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 707, n. 13 (1978), quoting *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (CA7 1971). An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

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[13] After comparing this description of the plaintiff's proof to that offered by JUSTICE O'CONNOR's opinion concurring in the judgment, *post*, at 276–277, we do not understand why the concurrence suggests that they are meaningfully different from each other, see *post*, at 275, 277–279. Nor do we see how the inquiry that we have described is "hypothetical," see *post*, at 283, n. 1. It seeks to determine the content of the entire set of reasons for a decision, rather than shaving off one reason in an attempt to determine what the decision would have been in the absence of that consideration. The inquiry that we describe thus strikes us as a distinctly nonhypothetical one.

Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part. In any event, the stereotyping in this case did not simply consist of stray remarks. On the contrary, Hopkins proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board's decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations. This is not, as Price Waterhouse suggests, "discrimination in the air"; rather, it is, as Hopkins puts it, "discrimination brought to ground and visited upon" an employee. Brief for Respondent 30. By focusing on Hopkins' specific proof, however, we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, "standing alone," would or would not establish a plaintiff's case, since such a decision is unnecessary in this case. But see *post*, at 277 (O'CONNOR, J., concurring in judgment).

As to the employer's proof, in most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive.[14] Moreover, proving "'that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.'" *Givhan*, 439 U. S., at 416, quoting *Ayers* v. *Western Line Consolidated School District*, 555 F. 2d 1309, 1315 (CA5 1977). An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The very premise of a mixed-motives case is that a legitimate reason was present, and indeed, in this case, Price Waterhouse already has made this showing by convincing Judge Gesell that Hopkins' interpersonal problems were a legitimate concern. The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

III

The courts below held that an employer who has allowed a discriminatory impulse to play a motivating part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination. We are persuaded that the better rule is that the employer must make this showing by a preponderance of the evidence.

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[14] JUSTICE WHITE's suggestion, *post*, at 261, that the employer's own testimony as to the probable decision in the absence of discrimination is due special credence where the court has, contrary to the employer's testimony, found that an illegitimate factor played a part in the decision, is baffling.

Conventional rules of civil litigation generally apply in Title VII cases, see, *e. g., United States Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 716 (1983) (discrimination not to be "treat[ed] . . . differently from other ultimate questions of fact"), and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence. See, *e. g., Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 390 (1983). Exceptions to this standard are uncommon, and in fact are ordinarily recognized only when the government seeks to take unusual coercive action—action more dramatic than entering an award of money damages or other conventional relief—against an individual. See *Santosky* v. *Kramer*, 455 U. S. 745, 756 (1982) (termination of parental rights); *Addington* v. *Texas*, 441 U. S. 418, 427 (1979) (involuntary commitment); *Woodby* v. *INS*, 385 U. S. 276 (1966) (deportation); *Schneiderman* v. *United States*, 320 U. S. 118, 122, 125 (1943) (denaturalization). Only rarely have we required clear and convincing proof where the action defended against seeks only conventional relief, see, *e. g., Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 342 (1974) (defamation), and we find it significant that in such cases it was the defendant rather than the plaintiff who sought the elevated standard of proof—suggesting that this standard ordinarily serves as a shield rather than, as Hopkins seeks to use it, as a sword.

It is true, as Hopkins emphasizes, that we have noted the "clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 562 (1931). Likewise, an Equal Employment Opportunity Commission (EEOC) regulation does require federal agencies proved to have violated

Title VII to show by clear and convincing evidence that an individual employee is not entitled to relief. See 29 CFR § 1613.271(c)(2) (1988). And finally, it is true that we have emphasized the importance of make-whole relief for victims of discrimination. See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975). Yet each of these sources deals with the proper determination of relief rather than with the initial finding of liability. This is seen most easily in the EEOC's regulation, which operates only after an agency or the EEOC has found that "an employee of the agency was discriminated against." See 29 CFR § 1613.271(c) (1988). Because we have held that, by proving that it would have made the same decision in the absence of discrimination, the employer may avoid a finding of liability altogether and not simply avoid certain equitable relief, these authorities do not help Hopkins to show why we should elevate the standard of proof for an employer in this position.

Significantly, the cases from this Court that most resemble this one, *Mt. Healthy* and *Transportation Management*, did not require clear and convincing proof. *Mt. Healthy*, 429 U. S., at 287; *Transportation Management*, 462 U. S., at 400, 403. We are not inclined to say that the public policy against firing employees because they spoke out on issues of public concern or because they affiliated with a union is less important than the policy against discharging employees on the basis of their gender. Each of these policies is vitally important, and each is adequately served by requiring proof by a preponderance of the evidence.

Although Price Waterhouse does not concretely tell us how its proof was preponderant even if it was not clear and convincing, this general claim is implicit in its request for the less stringent standard. Since the lower courts required Price Waterhouse to make its proof by clear and convincing evidence, they did not determine whether Price Waterhouse had proved by *a preponderance of the evidence* that it would have placed Hopkins' candidacy on hold even if it had not permitted sex-linked evaluations to play a part in the decision-making process. Thus, we shall remand this case so that that determination can be made.

IV

The District Court found that sex stereotyping "was permitted to play a part" in the evaluation of Hopkins as a candidate for partnership. 618 F. Supp., at 1120. Price Waterhouse disputes both that stereotyping occurred and that it played any part in the decision to place Hopkins' candidacy on hold. In the firm's view, in other words, the District Court's factual conclusions are clearly erroneous. We do not agree.

In finding that some of the partners' comments reflected sex stereotyping, the District Court relied in part on Dr. Fiske's expert testimony. Without directly impugning Dr. Fiske's credentials or qualifications, Price Waterhouse insinuates that a social psychologist is unable to identify sex stereotyping in evaluations without investigating whether those evaluations have a basis in reality. This argument comes too late. At trial, counsel for Price Waterhouse twice assured the court that he did not question Dr. Fiske's expertise (App. 25) and failed to challenge the legitimacy of her discipline. Without contradiction from Price Waterhouse, Fiske testified that she discerned sex stereotyping in the partners' evaluations of Hopkins, and she further explained that it was part of her business to identify stereotyping in written documents. *Id.*, at 64. We are not inclined to accept petitioner's belated and unsubstantiated characterization of Dr. Fiske's testimony as "gossamer evidence" (Brief for Petitioner 20) based only on "intuitive hunches" (*id.*, at 44) and of her detection of sex stereotyping as "intuitively divined" (*id.*, at 43). Nor are we disposed to adopt the dissent's dismissive attitude toward Dr. Fiske's field of study and toward her own professional integrity, see *post*, at 293–294, n. 5.

Indeed, we are tempted to say that Dr. Fiske's expert testimony was merely icing on Hopkins' cake. It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring "a course at charm school." Nor, turning to Thomas Beyer's memorable advice to Hopkins, does it require expertise in psychology to know that, if an employee's flawed "interpersonal skills" can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.[15]

Price Waterhouse also charges that Hopkins produced no evidence that sex stereotyping played a role in the decision to place her candidacy on hold. As we have stressed, however, Hopkins showed that the partnership solicited evaluations from all of the firm's partners; that it generally relied very heavily on such evaluations in making its decision; that some of the partners' comments were the product of stereotyping; and that the firm in no way disclaimed reliance on those particular comments, either in Hopkins' case or in the past. Certainly a plausible—and, one might say, inevitable—conclusion to draw from this set of circumstances is that the Policy Board in making its decision did in fact take into account all of the partners' comments, including the comments that were motivated by stereotypical notions about women's proper deportment.[16]

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[15] We reject the claim, advanced by Price Waterhouse here and by the dissenting judge below, that the District Court clearly erred in finding that Beyer was "responsible for telling [Hopkins] what problems the Policy Board had identified with her candidacy." 618 F. Supp., at 1117. This conclusion was reasonable in light of the testimony at trial of a member of both the Policy Board and the Admissions Committee, who stated that he had "no doubt" that Beyer would discuss with Hopkins the reasons for placing her candidacy on hold and that Beyer "knew exactly where the problems were" regarding Hopkins. Tr. 316.

[16] We do not understand the dissenters' dissatisfaction with the District Judge's statements regarding the failure of Price Waterhouse to "sensitize" partners to the dangers of sexism. *Post*, at 294. Made in the con-

Price Waterhouse concedes that the proof in *Transportation Management* adequately showed that the employer there had relied on an impermissible motivation in firing the plaintiff. Brief for Petitioner 45. But the only evidence in that case that a discriminatory motive contributed to the plaintiff's discharge was that the employer harbored a grudge toward the plaintiff on account of his union activity; there was, contrary to Price Waterhouse's suggestion, no direct evidence that that grudge had played a role in the decision, and, in fact, the employer had given other reasons in explaining the plaintiff's discharge. See 462 U. S., at 396. If the partnership considers that proof sufficient, we do not know why it takes such vehement issue with Hopkins' proof.

Nor is the finding that sex stereotyping played a part in the Policy Board's decision undermined by the fact that many of the suspect comments were made by supporters rather than detractors of Hopkins. A negative comment, even when made in the context of a generally favorable review, nevertheless may influence the decisionmaker to think less highly of the candidate; the Policy Board, in fact, did not simply tally the "yesses" and "noes" regarding a candidate, but carefully reviewed the content of the submitted comments. The additional suggestion that the comments were made by "persons outside the decisionmaking chain" (Brief for Petitioner 48)—and therefore could not have harmed Hopkins—simply ignores the critical role that partners' comments played in the Policy Board's partnership decisions.

Price Waterhouse appears to think that we cannot affirm the factual findings of the trial court without deciding that, instead of being overbearing and aggressive and curt, Hopkins is, in fact, kind and considerate and patient. If this is indeed its impression, petitioner misunderstands the theory

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text of determining that Price Waterhouse had not disclaimed reliance on sex-based evaluations, and following the judge's description of the firm's history of condoning such evaluations, the judge's remarks seem to us justified.

on which Hopkins prevailed. The District Judge acknowledged that Hopkins' conduct justified complaints about her behavior as a senior manager. But he also concluded that the reactions of at least some of the partners were reactions to her as a *woman* manager. Where an evaluation is based on a subjective assessment of a person's strengths and weaknesses, it is simply not true that each evaluator will focus on, or even mention, the same weaknesses. Thus, even if we knew that Hopkins had "personality problems," this would not tell us that the partners who cast their evaluations of Hopkins in sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man. It is not our job to review the evidence and decide that the negative reactions to Hopkins were based on reality; our perception of Hopkins' character is irrelevant. We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.

V

We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account. Because the courts below erred by deciding that the defendant must make this proof by clear and convincing evidence, we reverse the Court of Appeals' judgment against Price Waterhouse on liability and remand the case to that court for further proceedings.

It is so ordered.

JUSTICE WHITE, concurring in the judgment.

In my view, to determine the proper approach to causation in this case, we need look only to the Court's opinion in *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977). In *Mt. Healthy*, a public employee was not rehired, in part because of his exercise of First Amendment rights and in part because of permissible considerations. The Court rejected a rule of causation that focused "solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire," on the grounds that such a rule could make the employee better off by exercising his constitutional rights than by doing nothing at all. *Id.*, at 285. Instead, the Court outlined the following approach:

> "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that his conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.*, at 287 (footnote omitted).

It is not necessary to get into semantic discussions on whether the *Mt. Healthy* approach is "but-for" causation in another guise or creates an affirmative defense on the part of the employer to see its clear application to the issues before us in this case. As in *Mt. Healthy*, the District Court found that the employer was motivated by both legitimate and illegitimate factors. And here, as in *Mt. Healthy*, and as the Court now holds, Hopkins was not required to prove that the illegitimate factor was the only, principal, or true reason for petitioner's action. Rather, as JUSTICE O'CONNOR states, her burden was to show that the unlawful motive was a *substantial* factor in the adverse employment action. The District Court, as its opinion was construed by the Court of Appeals, so found, 263 U. S. App. D. C. 321, 333, 334, 825 F. 2d 458, 470, 471 (1987), and I agree that the finding was supported by the record. The burden of persuasion then should have shifted to Price Waterhouse to prove "by a preponderance of the evidence that it would have reached the same decision . . . in the absence of" the unlawful motive. *Mt. Healthy*, *supra*, at 287.

I agree with JUSTICE BRENNAN that applying this approach to causation in Title VII cases is not a departure from, and does not require modification of, the Court's holdings in *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981), and *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973). The Court has made clear that "mixed-motives" cases, such as the present one, are different from pretext cases such as *McDonnell Douglas* and *Burdine*. In pretext cases, "the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision." *NLRB* v. *Transportation Management Corp.*, 462 U. S. 393, 400, n. 5 (1983). In mixed-motives cases, however, there is no one "true" motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate. It can hardly be said that our decision in this case is a departure from cases that are "inapposite." *Ibid.* I also disagree with the dissent's assertion that this approach to causation is inconsistent with our statement in *Burdine* that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U. S., at 253. As we indicated in *Transportation Management Corp.*, the showing required by *Mt. Healthy* does not improperly shift from the plaintiff the ultimate burden of persuasion on whether the defendant intentionally discriminated against him or her. See 462 U. S., at 400, n. 5.

Because the Court of Appeals required Price Waterhouse to prove by clear and convincing evidence that it would have reached the same employment decision in the absence of the improper motive, rather than merely requiring proof by a preponderance of the evidence as in *Mt. Healthy*, I concur in the judgment reversing this case in part and remanding.

With respect to the employer's burden, however, the plurality seems to require, at least in most cases, that the employer submit objective evidence that the same result would have occurred absent the unlawful motivation. *Ante*, at 252. In my view, however, there is no special requirement that the employer carry its burden by objective evidence. In a mixed-motives case, where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof. This would even more plainly be the case where the employer denies any illegitimate motive in the first place but the court finds that illegitimate, as well as legitimate, factors motivated the adverse action.[*]

JUSTICE O'CONNOR, concurring in the judgment.

I agree with the plurality that, on the facts presented in this case, the burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision concerning Ann Hopkins' candidacy absent consideration of her gender. I further agree that this burden shift is properly part of the liability phase of the litigation. I thus concur in the judgment of the Court. My disagreement stems from the plurality's conclusions concerning the substantive requirement of causation under the statute and its broad statements regarding the applicability of the allocation of the burden of proof applied in this case. The evidentiary rule the Court adopts today should be viewed as a supplement to the careful framework established by our unanimous decisions in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), and *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981), for use in cases such as this one where the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion. I write separately to explain why I believe such a departure from the *McDonnell Douglas* standard is justified in the circumstances presented by this and like cases, and to express my views as to when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered.

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[*] I agree with the plurality that if the employer carries this burden, there has been no violation of Title VII.

I

Title VII provides in pertinent part: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a) (emphasis added). The legislative history of Title VII bears out what its plain language suggests: a substantive violation of the statute only occurs when consideration of an illegitimate criterion is the "but-for" cause of an adverse employment action. The legislative history makes it clear that Congress was attempting to eradicate discriminatory actions in the employment setting, not mere discriminatory thoughts. Critics of the bill that became Title VII labeled it a "thought control bill," and argued that it created a "punishable crime that does not require an illegal external act as a basis for judgment." 100 Cong. Rec. 7254 (1964) (remarks of Sen. Ervin). Senator Case, whose views the plurality finds so persuasive elsewhere, responded:

> "The man must do or fail to do something in regard to employment. There must be some specific external act, more than a mental act. Only if he does the act because of the grounds stated in the bill would there be any legal consequences." *Ibid.*

Thus, I disagree with the plurality's dictum that the words "because of" do not mean "but-for" causation; manifestly they do. See *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421, 499 (1986) (WHITE, J., dissenting) ("[T]he general policy under Title VII is to limit relief for racial discrimination in employment practices to actual victims of the discrimination"). We should not, and need not, deviate from that policy today. The question for decision in this case is what allocation of the burden of persuasion on the issue of causation best conforms with the intent of Congress and the purposes behind Title VII.

The evidence of congressional intent as to which party should bear the burden of proof on the issue of causation is considerably less clear. No doubt, as a general matter, Congress assumed that the plaintiff in a Title VII action would bear the burden of proof on the elements critical to his or her case. As the dissent points out, *post*, at 287, n. 3, the interpretative memorandum submitted by sponsors of Title VII indicates that "the plaintiff, *as in any civil case*, would have the burden of proving that discrimination had occurred." 110 Cong. Rec. 7214 (1964) (emphasis added). But in the area of tort liability, from whence the dissent's "but-for" standard of causation is derived, see *post*, at 282, the law has long recognized that in certain "civil cases" leaving the burden of persuasion on the plaintiff to prove "but-for" causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care. Thus, in multiple causation cases, where a breach of duty has been established, the common law of torts has long shifted the burden of proof to multiple defendants to prove that their negligent actions were not the "but-for" cause of the plaintiff's injury. See *e. g.*, *Summers* v. *Tice*, 33 Cal. 2d 80, 84–87, 199 P. 2d 1, 3–4 (1948). The same rule has been applied where the effect of a defendant's tortious conduct combines with a force of unknown or innocent origin to produce the harm to the plaintiff. See *Kingston* v. *Chicago & N. W. R. Co.*, 191 Wis. 610, 616, 211 N. W. 913, 915 (1927) ("Granting that the union of that fire [caused by defendant's negligence] with another of natural origin, or with another of much greater proportions, is available as a defense, the burden is on the defendant to show that . . . the fire set by him was not the proximate cause of the damage"). See also 2 J. Wigmore, Select Cases on the Law of Torts § 153, p. 865 (1912) ("When two or more persons by their acts are possibly the sole cause of a harm, or when two or more acts of the same person are possibly the sole cause, and the plaintiff has introduced evidence that one of the two persons, or one of the same person's two acts, is culpable, then the defendant has the burden of proving that the other person, or his other act, was the sole cause of the harm").

While requiring that the plaintiff in a tort suit or a Title VII action prove that the defendant's "breach of duty" was the "but-for" cause of an injury does not generally hamper effective enforcement of the policies behind those causes of action,

> "at other times the [but-for] test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning facts that concededly never existed. The very uncertainty as to what *might* have happened opens the door wide for conjecture. But when conjecture is demanded it can be given a direction that is consistent with the policy considerations that underlie the controversy." Malone, Ruminations on Cause-In-Fact, 9 Stan. L. Rev. 60, 67 (1956).

Like the common law of torts, the statutory employment "tort" created by Title VII has two basic purposes. The first is to deter conduct which has been identified as contrary to public policy and harmful to society as a whole. As we have noted in the past, the award of backpay to a Title VII plaintiff provides "the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination in employment. *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417–418 (1975) (citation omitted). The second goal of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.*, at 418.

Both these goals are reflected in the elements of a disparate treatment action. There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. As Senator Clark put it, "[t]he bill simply eliminates consideration of color [or other forbidden criteria] from the decision to hire or promote." 110 Cong. Rec. 7218 (1964). See also *id.*, at 13088 (remarks of Sen. Humphrey) ("What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment"). Reliance on such factors is exactly what the threat of Title VII liability was meant to deter. While the main concern of the statute was with employment opportunity, Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex. This Court's decisions under the Equal Protection Clause have long recognized that whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual. See *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989). At the same time, Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor *caused* a tangible employment injury of some kind.

Where an individual disparate treatment plaintiff has shown by a preponderance of the evidence that an illegitimate criterion was a *substantial* factor in an adverse employment decision, the deterrent purpose of the statute has clearly been triggered. More importantly, as an evidentiary matter, a reasonable factfinder could conclude that absent further explanation, the employer's discriminatory motivation "caused" the employment decision. The employer has not yet been shown to be a violator, but neither is it entitled to the same presumption of good faith concerning its employment decisions which is accorded employers facing only circumstantial evidence of discrimination. Both the policies behind the statute, and the evidentiary principles developed in the analogous area of causation in the law of torts, suggest that at this point the employer may be required to convince the factfinder that, despite the smoke, there is no fire.

We have given recognition to these principles in our cases which have discussed the "remedial phase" of class action disparate treatment cases. Once the class has established that discrimination against a protected group was essentially the employer's "standard practice," there has been harm to the group and injunctive relief is appropriate. But as to the individual members of the class, the liability phase of the litigation is not complete. See *Dillon* v. *Coles*, 746 F. 2d 998, 1004 (CA3 1984) ("It is misleading to speak of the additional proof required by an individual class member for relief as being a part of the damage phase, that evidence is actually an element of the liability portion of the case") (footnote omitted). Because the class has already demonstrated that, as a rule, illegitimate factors were considered in the employer's decisions, the burden shifts to the employer "to demonstrate that the individual applicant was denied an employment opportunity for legitimate reasons." *Teamsters* v. *United States*, 431 U. S. 324, 362 (1977). See also *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 772 (1976).

The individual members of a class action disparate treatment case stand in much the same position as Ann Hopkins here. There has been a strong showing that the employer has done exactly what Title VII forbids, but the connection between the employer's illegitimate motivation and any injury to the individual plaintiff is unclear. At this point calling upon the employer to show that despite consideration of illegitimate factors the individual plaintiff would not have been hired or promoted in any event hardly seems "unfair" or contrary to the substantive command of the statute. In fact, an individual plaintiff who has shown that an illegitimate factor played a substantial role in the decision in his or her case has proved *more* than the class member in a *Teamsters* type action. The latter receives the benefit of a burden shift to the defendant based on the *likelihood* that an illegitimate criterion was a factor in the individual employment decision.

There is a tension between the *Franks* and *Teamsters* line of decisions and the individual disparate treatment cases cited by the dissent. See *post*, at 286–289. Logically, under the dissent's view, each member of a disparate treatment class action would have to show "but-for" causation as to his or her individual employment decision, since it is not an element of the pattern or practice proof of the entire class and it is statutorily mandated that the plaintiff bear the burden of proof on this issue throughout the litigation. While the Court has properly drawn a distinction between the elements of a class action claim and an individual disparate treatment claim, see *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U. S. 867, 873–878 (1984), and I do not suggest the wholesale transposition of rules from one setting to the other, our decisions in *Teamsters* and *Franks* do indicate a recognition that presumptions shifting the burden of persuasion based on evidentiary probabilities and the policies behind the statute are not alien to our Title VII jurisprudence.

Moreover, placing the burden on the defendant in this case to prove that the same decision would have been justified by legitimate reasons is consistent with our interpretation of the constitutional guarantee of equal protection. Like a disparate treatment plaintiff, one who asserts that governmental action violates the Equal Protection Clause must show that he or she is "the victim of intentional discrimination." *Burdine*, 450 U. S., at 256. Compare *post*, at 286, 289 (KENNEDY, J., dissenting), with *Washington* v. *Davis*, 426 U. S. 229, 240 (1976). In *Alexander* v. *Louisiana*, 405 U. S. 625 (1972), we dealt with a criminal defendant's allegation that members of his race had been invidiously excluded from the grand jury which indicted him in violation of the Equal Protection Clause. In addition to the statistical evidence presented by petitioner in that case, we noted that the State's "selection procedures themselves were not racially neutral." *Id.*, at 630. Once the consideration of race in the decisional process had been established, we held that "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Id.*, at 632.

We adhered to similar principles in *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977), a case which, like this one, presented the problems of motivation and causation in the context of a multimember decisionmaking body authorized to consider a wide range of factors in arriving at its decisions. In *Arlington Heights* a group of minority plaintiffs claimed that a municipal governing body's refusal to rezone a plot of land to allow for the construction of low-income integrated housing was racially motivated. On the issue of causation, we indicated that the plaintiff was not required

> "to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the deci-

> sion, this judicial deference is no longer justified." *Id.*, at 265–266 (citation omitted).

If the strong presumption of regularity and rationality of legislative decisionmaking must give way in the face of evidence that race has played a significant part in a legislative decision, I simply cannot believe that Congress intended Title VII to accord *more* deference to a private employer in the face of evidence that its decisional process has been substantially infected by discrimination. Indeed, where a public employee brings a "disparate treatment" claim under 42 U. S. C. § 1983 and the Equal Protection Clause the employee is entitled to the favorable evidentiary framework of *Arlington Heights*. See, *e. g., Hervey* v. *Little Rock*, 787 F. 2d 1223, 1233–1234 (CA8 1986) (applying *Arlington Heights* to public employee's claim of sex discrimination in promotion decision); *Lee* v. *Russell County Bd. of Education*, 684 F. 2d 769, 773–774 (CA11 1982) (applying *Arlington Heights* to public employees' claims of race discrimination in discharge case). Under the dissent's reading of Title VII, Congress' extension of the coverage of the statute to public employers in 1972 has placed these employees under a less favorable evidentiary regime. In my view, nothing in the language, history, or purpose of Title VII prohibits adoption of an evidentiary rule which places the burden of persuasion on the defendant to demonstrate that legitimate concerns would have justified an adverse employment action where the plaintiff has convinced the factfinder that a forbidden factor played a substantial role in the employment decision. Even the dissenting judge below "[had] no quarrel with [the] principle" that "a party with one permissible motive and one unlawful one may prevail only by affirmatively proving that it would have acted as it did even if the forbidden motive were absent." 263 U. S. App. D. C. 321, 341, 825 F. 2d 458, 478 (1987) (Williams, J. dissenting).

II

The dissent's summary of our individual disparate treatment cases to date is fair and accurate, and amply demonstrates that the rule we adopt today is at least a change in direction from some of our prior precedents. See *post*, at 286–289. We have indeed emphasized in the past that in an individual disparate treatment action the plaintiff bears the burden of persuasion throughout the litigation. Nor have we confined the word "pretext" to the narrow definition which the plurality attempts to pin on it today. See *ante*, at 244–247. *McDonnell Douglas* and *Burdine* clearly contemplated that a disparate treatment plaintiff could show that the employer's proffered explanation for an event was not "the true reason" either because it *never* motivated the employer in its employment decisions or because it did not do so in a particular case. *McDonnell Douglas* and *Burdine* assumed that the plaintiff would bear the burden of persuasion as to both these attacks, and we clearly depart from that framework today. Such a departure requires justification, and its outlines should be carefully drawn.

First, *McDonnell Douglas* itself dealt with a situation where the plaintiff presented no direct evidence that the employer had relied on a forbidden factor under Title VII in making an employment decision. The prima facie case established there was not difficult to prove, and was based only on the statistical probability that when a number of potential causes for an employment decision are eliminated an inference arises that an illegitimate factor was in fact the motivation behind the decision. See *Teamsters*, 431 U. S., at 358, n. 44 ("[T]he *McDonnell Douglas* formula does not require direct proof of discrimination"). In the face of this inferential proof, the employer's burden was deemed to be only one of production; the employer must articulate a legitimate reason for the adverse employment action. See *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 577 (1978). The plaintiff must then be given an "opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." *McDonnell Douglas*, 411 U. S., at 805. Our decision in *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981), also involved the "narrow question" whether, after a plaintiff had carried the "not onerous" burden of establishing the prima facie case under *McDonnell Douglas*, the burden of persuasion should be shifted to the employer to prove that a legitimate reason for the adverse employment action existed. 450 U. S., at 250. As the discussion of *Teamsters* and *Arlington Heights* indicates, I do not think that the employer is entitled to the same presumption of good faith where there is direct evidence that it has placed substantial reliance on factors whose consideration is forbidden by Title VII.

The only individual disparate treatment case cited by the dissent which involved the kind of direct evidence of discriminatory animus with which we are confronted here is *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 713–714, n. 2 (1983). The question presented to the Court in that case involved only a challenge to the elements of the prima facie case under *McDonnell Douglas* and *Burdine*, see Pet. for Cert. in *United States Postal Service Bd. of Governors* v. *Aikens*, O. T. 1981, No. 81–1044, and the question we confront today was neither briefed nor argued to the Court. As should be apparent, the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by. That the employer's burden in rebutting such an inferential case of discrimination is only one of production does not mean that the scales should be weighted in the same manner where there *is* direct evidence of intentional discrimination. Indeed, in one Age Discrimination in Employment Act case, the Court seemed to indicate that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." *Trans World*

Airlines, Inc. v. *Thurston,* 469 U. S. 111, 121 (1985). See also *East Texas Motor Freight System, Inc.* v. *Rodriguez,* 431 U. S. 395, 403–404, n. 9 (1977).

Second, the facts of this case, and a growing number like it decided by the Courts of Appeals, convince me that the evidentiary standard I propose is necessary to make real the promise of *McDonnell Douglas* that "[i]n the implementation of [employment] decisions, it is abundantly clear that Title VII tolerates no . . . discrimination, subtle or otherwise." 411 U. S., at 801. In this case, the District Court found that a number of the evaluations of Ann Hopkins submitted by partners in the firm overtly referred to her failure to conform to certain gender stereotypes as a factor militating against her election to the partnership. 618 F. Supp. 1109, 1116–1117 (DC 1985). The District Court further found that these evaluations were given "great weight" by the decisionmakers at Price Waterhouse. *Id.*, at 1118. In addition, the District Court found that the partner responsible for informing Hopkins of the factors which caused her candidacy to be placed on hold, indicated that her "professional" problems would be solved if she would "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.*, at 1117 (footnote omitted). As the Court of Appeals characterized it, Ann Hopkins proved that Price Waterhouse "permitt[ed] stereotypical attitudes towards women to play a significant, though unquantifiable, role in its decision not to invite her to become a partner." 263 U. S. App. D. C., at 324, 825 F. 2d, at 461.

At this point Ann Hopkins had taken her proof as far as it could go. She had proved discriminatory input into the decisional process, and had proved that participants in the process considered her failure to conform to the stereotypes credited by a number of the decisionmakers had been a substantial factor in the decision. It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was *told* by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid. If, as we noted in *Teamsters*, "[p]resumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof," 431 U. S., at 359, n. 45, one would be hard pressed to think of a situation where it would be more appropriate to require the defendant to show that its decision would have been justified by wholly legitimate concerns.

Moreover, there is mounting evidence in the decisions of the lower courts that respondent here is not alone in her inability to pinpoint discrimination as the precise cause of her injury, despite having shown that it played a significant role in the decisional process. Many of these courts, which deal with the evidentiary issues in Title VII cases on a regular basis, have concluded that placing the risk of nonpersuasion on the defendant in a situation where uncertainty as to causation has been created by its consideration of an illegitimate criterion makes sense as a rule of evidence and furthers the substantive command of Title VII. See, *e. g.*, *Bell* v. *Birmingham Linen Service*, 715 F. 2d 1552, 1556 (CA11 1983) (Tjoflat, J.) ("It would be illogical, indeed ironic, to hold a Title VII plaintiff presenting direct evidence of a defendant's intent to discriminate to a more stringent burden of proof, or to allow a defendant to meet that direct proof by merely articulating, but not proving, legitimate, nondiscriminatory reasons for its action"). Particularly in the context of the professional world, where decisions are often made by collegial bodies on the basis of largely subjective criteria, requiring the plaintiff to prove that *any* one factor was the definitive cause of the decisionmakers' action may be tantamount to declaring Title VII inapplicable to such decisions. See, *e. g.*, *Fields* v. *Clark University*, 817 F. 2d 931, 935–937

(CA1 1987) (where plaintiff produced "strong evidence" that sexist attitudes infected faculty tenure decision, burden properly shifted to defendant to show that it would have reached the same decision absent discrimination); *Thompkins* v. *Morris Brown College*, 752 F. 2d 558, 563 (CA11 1985) (direct evidence of discriminatory animus in decision to discharge college professor shifted burden of persuasion to defendant).

Finally, I am convinced that a rule shifting the burden to the defendant where the plaintiff has shown that an illegitimate criterion was a "substantial factor" in the employment decision will not conflict with other congressional policies embodied in Title VII. Title VII expressly provides that an employer need not give preferential treatment to employees or applicants of any race, color, religion, sex, or national origin in order to maintain a work force in balance with the general population. See 42 U. S. C. § 2000e–2(j). The interpretive memorandum, whose authoritative force is noted by the plurality, see *ante*, at 243, n. 8, specifically provides: "There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race." 110 Cong. Rec. 7213 (1964).

Last Term, in *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977 (1988), the Court unanimously concluded that the disparate impact analysis first enunciated in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), should be extended to subjective or discretionary selection processes. At the same time a plurality of the Court indicated concern that the focus on bare statistics in the disparate impact setting could force employers to adopt "inappropriate prophylactic measures" in violation of § 2000e–2(j). The plurality went on to emphasize that in a disparate impact case, the plaintiff may not simply point to a statistical disparity in the employer's work force. Instead, the plaintiff must identify a particular employment practice and "must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." 487 U. S., at 994. The plurality indicated that "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." *Id.*, at 997.

I believe there are significant differences between shifting the burden of persuasion to the employer in a case resting purely on statistical proof as in the disparate impact setting and shifting the burden of persuasion in a case like this one, where an employee has demonstrated by direct evidence that an illegitimate factor played a substantial role in a particular employment decision. First, the explicit consideration of race, color, religion, sex, or national origin in making employment decisions "was the most obvious evil Congress had in mind when it enacted Title VII." *Teamsters*, 431 U. S., at 335, n. 15. While the prima facie case under *McDonnell Douglas* and the statistical showing of imbalance involved in a disparate impact case may both be indicators of discrimination or its "functional equivalent," they are not, in and of themselves, the evils Congress sought to eradicate from the employment setting. Second, shifting the burden of persuasion to the employer in a situation like this one creates no incentive to preferential treatment in violation of § 2000e–(2)(j). To avoid bearing the burden of justifying its decision, the employer need not seek racial or sexual balance in its work force; rather, all it need do is avoid substantial reliance on forbidden criteria in making its employment decisions.

While the danger of forcing employers to engage in unwarranted preferential treatment is thus less dramatic in this setting than in the situation the Court faced in *Watson*, it is far from wholly illusory. Based on its misreading of the words "because of" in the statute, see *ante*, at 240–242, the plurality appears to conclude that if a decisional process is "tainted" by awareness of sex or race in any way, the employer has violated the statute, and Title VII thus *commands* that the burden shift to the employer to justify its decision. *Ante*, at 250–252. The plurality thus effectively reads the causation requirement out of the statute, and then replaces it with an "affirmative defense." *Ante*, at 244–247.

In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision. As the Court of Appeals noted below: "While most circuits have not confronted the question squarely, the consensus among those that have is that once a Title VII plaintiff has demonstrated by direct evidence that discriminatory animus played a significant or substantial role in the employment decision, the burden shifts to the employer to show that the decision would have been the same absent discrimination." 263 U. S. App. D. C., at 333–344, 825 F. 2d, at 470–471. Requiring that the plaintiff demonstrate that an illegitimate factor played a substantial role in the employment decision identifies those employment situations where the deterrent purpose of Title VII is most clearly implicated. As an evidentiary matter, where a plaintiff has made this type of strong showing of illicit motivation, the factfinder is entitled to presume that the employer's discriminatory animus made a difference to the outcome, absent proof to the contrary from the employer. Where a disparate treatment plaintiff has made such a showing, the burden then rests with the employer to convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor. The employer need not isolate the sole cause for the decision; rather it must demonstrate that with the illegitimate factor removed from the calculus, sufficient business reasons would have induced it to take the same employment action. This evidentiary scheme essentially requires the employer to place the employee in the same position he or she would have occupied absent discrimination. Cf. *Mt. Healthy City Bd. of Ed.* v. *Doyle,* 429 U. S. 274, 286 (1977). If the employer fails to carry this burden, the factfinder is justified in concluding that the decision was made "because of" consideration of the illegitimate factor and the substantive standard for liability under the statute is satisfied.

Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, see *Meritor Savings Bank* v. *Vinson,* 477 U. S. 57, 63–69 (1986), cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard. In addition, in my view testimony such as Dr. Fiske's in this case, standing alone, would not justify shifting the burden of persuasion to the employer. Race and gender always "play a role" in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion. For example, in the context of this case, a mere reference to "a lady candidate" might show that gender "played a role" in the decision, but by no means could support a rational factfinder's inference that the decision was made "because of" sex. What is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.

It should be obvious that the threshold standard I would adopt for shifting the burden of persuasion to the defendant differs substantially from that proposed by the plurality, the plurality's suggestion to the contrary notwithstanding. See *ante,* at 250, n. 13. The plurality proceeds from the premise that the words "because of" in the statute do not embody any causal requirement at all. Under my approach, the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made "because of" the plaintiff's protected status. Only then would the burden of proof shift to the defendant to prove that the decision would have been justified by other, wholly legitimate considerations. See also *ante*, at 259–260 (WHITE, J., concurring in judgment).

In sum, because of the concerns outlined above, and because I believe that the deterrent purpose of Title VII is disserved by a rule which places the burden of proof on plaintiffs on the issue of causation in all circumstances, I would retain but supplement the framework we established in *McDonnell Douglas* and subsequent cases. The structure of the presentation of evidence in an individual disparate treatment case should conform to the general outlines we established in *McDonnell Douglas* and *Burdine.* First, the plaintiff must establish the *McDonnell Douglas* prima facie case by showing membership in a protected group, qualification for the job, rejection for the position, and that after rejection the employer continued to seek applicants of complainant's general qualifications. *McDonnell Douglas*, 411 U. S., at 802. The plaintiff should also present any direct evidence of discriminatory animus in the decisional process. The defendant should then present its case, including its evidence as to legitimate, nondiscriminatory reasons for the employment decision. As the dissent notes, under this framework, the employer "has every incentive to convince the trier of fact that the decision was lawful." *Post*, at 292, citing *Burdine*, 450 U. S., at 258. Once all the evidence has been received, the court should determine whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it. If the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* and *Burdine*, with the plaintiff bearing the burden of persuasion on the ultimate issue whether the employment action was taken because of discrimination. In my view, such a system is both fair and workable, and it calibrates the evidentiary requirements demanded of the parties to the goals behind the statute itself.

I agree with the dissent, see *post*, at 293, n. 4, that the evidentiary framework I propose should be available to all disparate treatment plaintiffs where an illegitimate consideration played a substantial role in an adverse employment decision. The Court's allocation of the burden of proof in *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616, 626–627 (1987), rested squarely on "the analytical framework set forth in *McDonnell Douglas*," *id.*, at 626, which we alter today. It would be odd to say the least if the evidentiary rules applicable to Title VII actions were themselves dependent on the gender or the skin color of the litigants. But see *ante*, at 239, n. 3.

In this case, I agree with the plurality that petitioner should be called upon to show that the outcome would have been the same if respondent's professional merit had been its only concern. On remand, the District Court should determine whether Price Waterhouse has shown by a preponderance of the evidence that if gender had not been part of the process, its employment decision concerning Ann Hopkins would nonetheless have been the same.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

Today the Court manipulates existing and complex rules for employment discrimination cases in a way certain to result in confusion. Continued adherence to the evidentiary scheme established in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), and *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981), is a wiser course than creation of more disarray in an area of the law already difficult for the bench and bar, and so I must dissent.

Before turning to my reasons for disagreement with the Court's disposition of the case, it is important to review the actual holding of today's decision. I read the opinions as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision. *Ante*, at 276–277 (opinion of O'CONNOR, J.); *ante*, at 259–260 (opinion of WHITE, J.). As the opinions make plain, the evidentiary scheme created today is not for every case in which a plaintiff produces evidence of stray remarks in the workplace. *Ante*, at 251 (opinion of BRENNAN, J.); *ante*, at 277 (opinion of O'CONNOR, J.).

Where the plaintiff makes the requisite showing, the burden that shifts to the employer is to show that legitimate employment considerations would have justified the decision without reference to any impermissible motive. *Ante*, at 260–261 (opinion of WHITE, J.); *ante*, at 278 (opinion of O'CONNOR, J.). The employer's proof on the point is to be presented and reviewed just as with any other evidentiary question: the Court does not accept the plurality's suggestion that an employer's evidence need be "objective" or otherwise out of the ordinary. *Ante*, at 261 (opinion of WHITE, J.).

In sum, the Court alters the evidentiary framework of *McDonnell Douglas* and *Burdine* for a closely defined set of cases. Although JUSTICE O'CONNOR advances some thoughtful arguments for this change, I remain convinced that it is unnecessary and unwise. More troubling is the plurality's rationale for today's decision, which includes a number of unfortunate pronouncements on both causation and methods of proof in employment discrimination cases. To demonstrate the defects in the plurality's reasoning, it is necessary to discuss, first, the standard of causation in Title VII cases, and, second, the burden of proof.

I

The plurality describes this as a case about the standard of *causation* under Title VII, *ante*, at 237, but I respectfully suggest that the description is misleading. Much of the plurality's rhetoric is spent denouncing a "but-for" standard of causation. The theory of Title VII liability the plurality adopts, however, essentially incorporates the but-for standard. The importance of today's decision is not the standard of causation it employs, but its shift to the defendant of the burden of proof. The plurality's causation analysis is misdirected, for it is clear that, whoever bears the burden of proof on the issue, Title VII liability requires a finding of but-for causation. See also *ante*, at 261, and n. (opinion of WHITE, J.); *ante*, at 262–263 (opinion of O'CONNOR, J.).

The words of Title VII are not obscure. The part of the statute relevant to this case provides:

> "It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a)(1) (emphasis added).

By any normal understanding, the phrase "because of" conveys the idea that the motive in question made a difference to the outcome. We use the words this way in everyday speech. And assuming, as the plurality does, that we ought to consider the interpretive memorandum prepared by the statute's drafters, we find that this is what the words meant to them as well. "To discriminate is to make a distinction, to make a difference in treatment or favor." 110 Cong. Rec. 7213 (1964). Congress could not have chosen a clearer way to indicate that proof of liability under Title VII requires a showing that race, color, religion, sex, or national origin caused the decision at issue.

Our decisions confirm that Title VII is not concerned with the mere presence of impermissible motives; it is directed to employment decisions that result from those motives. The verbal formulae we have used in our precedents are synonymous with but-for causation. Thus we have said that providing different insurance coverage to male and female employees violates the statute by treating the employee "'in a manner which but-for that person's sex would be different.'" *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 683 (1983), quoting *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 711 (1978). We have described the relevant question as whether the employment decision was "based on" a discriminatory criterion, *Teamsters* v. *United States*, 431 U. S. 324, 358 (1977), or whether the particular employment decision at issue was "made on the basis of" an impermissible factor, *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U. S. 867, 875 (1984).

What we term "but-for" cause is the least rigorous standard that is consistent with the approach to causation our precedents describe. If a motive is not a but-for cause of an event, then by definition it did not make a difference to the outcome. The event would have occurred just the same without it. Common-law approaches to causation often require proof of but-for cause as a starting point toward proof of legal cause. The law may require more than but-for cause, for instance proximate cause, before imposing liability. Any standard less than but-for, however, simply represents a decision to impose liability without causation. As Dean Prosser puts it, "[a]n act or omission is not regarded as a cause of an event if the particular event would have occurred without it." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984).

One of the principal reasons the plurality decision may sow confusion is that it claims Title VII liability is unrelated to but-for causation, yet it adopts a but-for standard once it has placed the burden of proof as to causation upon the employer. This approach conflates the question whether causation must be shown with the question of how it is to be shown. Because the plurality's theory of Title VII causation is ultimately consistent with a but-for standard, it might be said that my disagreement with the plurality's comments on but-for cause is simply academic. See *ante*, at 259 (opinion of WHITE, J.). But since those comments seem to influence the decision, I turn now to that part of the plurality's analysis.

The plurality begins by noting the quite unremarkable fact that Title VII is written in the present tense. *Ante*, at 240–241. It is unlawful "to fail" or "to refuse" to provide employment benefits on the basis of sex, not "to have failed" or "to have refused" to have done so. The plurality claims that the present tense excludes a but-for inquiry as the relevant standard because but-for causation is necessarily concerned with a hypothetical inquiry into how a past event would have occurred absent the contested motivation. This observation, however, tells us nothing of particular relevance to Title VII or the cause of action it creates. I am unaware of any federal prohibitory statute that is written in the past tense. Every liability determination, including the novel one constructed by the plurality, necessarily is concerned with the examination of a past event.[1] The plurality's analysis of verb tense serves only to divert attention from the causation requirement that is made part of the statute by the "because of" phrase. That phrase, I respectfully submit, embodies a rather simple concept that the plurality labors to ignore.[2]

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[1] The plurality's description of its own standard is both hypothetical and retrospective. The inquiry seeks to determine whether "if we asked the employer at the moment of decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." *Ante*, at 250.

We are told next that but-for cause is not required, since the words "because of" do not mean "*solely* because of." *Ante*, at 241. No one contends, however, that sex must be the sole cause of a decision before there is a Title VII violation. This is a separate question from whether consideration of sex must be *a* cause of the decision. Under the accepted approach to causation that I have discussed, sex is a cause for the employment decision whenever, either by itself or in combination with other factors, it made a difference to the decision. Discrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision, *i. e.*, a but-for cause. See *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U. S. 273, 282, n. 10 (1976). The plurality seems to say that since we know the words "because of" do not mean "solely because of," they must not mean "because of" at all. This does not follow, as a matter of either semantics or logic.

The plurality's reliance on the "bona fide occupational qualification" (BFOQ) provisions of Title VII, 42 U. S. C. §2000e–2(e), is particularly inapt. The BFOQ provisions allow an employer, in certain cases, to make an employment decision of which it is conceded that sex is the cause. That sex may be the legitimate cause of an employment decision where gender is a BFOQ is consistent with the opposite command that a decision caused by sex in any other case justifies the imposition of Title VII liability. This principle does not support, however, the novel assertion that a violation has occurred where sex made no difference to the outcome.

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[2] The plurality's discussion of overdetermined causes only highlights the error of its insistence that but-for is not the substantive standard of causation under Title VII. The opinion discusses the situation where two physical forces move an object, and either force acting alone would have moved the object. *Ante*, at 241. Translated to the context of Title VII, this situation would arise where an employer took an adverse action in reliance both on sex and on legitimate reasons, and *either* the illegitimate or the legitimate reason standing alone would have produced the action. If this state of affairs is proved to the factfinder, there will be no liability under the plurality's own test, for the same decision would have been made had the illegitimate reason never been considered.

The most confusing aspect of the plurality's analysis of causation and liability is its internal inconsistency. The plurality begins by saying: "When . . . an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account." *Ante*, at 241. Yet it goes on to state that "an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision." *Ante*, at 242.

Given the language of the statute, these statements cannot both be true. Title VII unambiguously states that an employer who makes decisions "because of" sex has violated the statute. The plurality's first statement therefore appears to indicate that an employer who considers illegitimate reasons when making a decision is a violator. But the opinion then tells us that the employer who shows that the same decision would have been made absent consideration of sex is *not* a violator. If the second statement is to be reconciled with the language of Title VII, it must be that a decision that would have been the same absent consideration of sex was not made "because of" sex. In other words, there is no violation of the statute absent but-for causation. The plurality's description of the "same decision" test it adopts supports this view. The opinion states that "[a] court that finds for a plaintiff under this standard has effectively concluded that an illegitimate motive was a 'but-for' cause of the employment decision," *ante*, at 249, and that this "is not an imposition of liability 'where sex made no difference to the outcome,'" *ante*, at 246, n. 11.

The plurality attempts to reconcile its internal inconsistency on the causation issue by describing the employer's showing as an "affirmative defense." This is nothing more than a label, and one not found in the language or legislative history of Title VII. Section 703(a)(1) is the statutory basis of the cause of action, and the Court is obligated to explain how its disparate-treatment decisions are consistent with the terms of § 703(a)(1), not with general themes of legislative history or with other parts of the statute that are plainly inapposite. While the test ultimately adopted by the plurality may not be inconsistent with the terms of § 703(a)(1), see *infra*, at 292, the same cannot be said of the plurality's reasoning with respect to causation. As JUSTICE O'CONNOR describes it, the plurality "reads the causation requirement out of the statute, and then replaces it with an 'affirmative defense.'" *Ante*, at 276. Labels aside, the import of today's decision is not that Title VII liability can arise without but-for causation, but that in certain cases it is not the plaintiff who must prove the presence of causation, but the defendant who must prove its absence.

II

We established the order of proof for individual Title VII disparate-treatment cases in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), and reaffirmed this allocation in *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981). Under *Burdine*, once the plaintiff presents a prima facie case, an inference of discrimination arises. The employer must rebut the inference by articulating a legitimate nondiscriminatory reason for its action. The final burden of persuasion, however, belongs to the plaintiff. *Burdine* makes clear that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*, at 253. See also *Board of Trustees of Keene State College* v.

Sweeney, 439 U. S. 24, 29 (1978) (STEVENS, J., dissenting).[3] I would adhere to this established evidentiary framework, which provides the appropriate standard for this and other individual disparate-treatment cases. Today's creation of a new set of rules for "mixed-motives" cases is not mandated by the statute itself. The Court's attempt at refinement provides limited practical benefits at the cost of confusion and complexity, with the attendant risk that the trier of fact will misapprehend the controlling legal principles and reach an incorrect decision.

In view of the plurality's treatment of *Burdine* and our other disparate-treatment cases, it is important first to state why those cases are dispositive here. The plurality tries to reconcile its approach with *Burdine* by announcing that it applies only to a "pretext" case, which it defines as a case in which the plaintiff attempts to prove that the employer's proffered explanation is itself false. *Ante*, at 245–247, and n. 11. This ignores the language of *Burdine*, which states that a plaintiff may succeed in meeting her ultimate burden of persuasion "*either* directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U. S., at 256 (emphasis added). Under the first of these two alternative methods, a plaintiff meets her burden if she can "persuade the court that the employment decision more likely than not was motivated by a discriminatory reason." *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 717–718 (1983)

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[3] The interpretive memorandum on which the plurality relies makes plain that "the plaintiff, as in any civil case, would have the burden of proving that discrimination had occurred." 110 Cong. Rec. 7214 (1964). Coupled with its earlier definition of discrimination, the memorandum tells us that the plaintiff bears the burden of showing that an impermissible motive "made a difference" in the treatment of the plaintiff. This is none other than the traditional requirement that the plaintiff show but-for cause.

(BLACKMUN, J., concurring). The plurality makes no attempt to address this aspect of our cases.

Our opinions make plain that *Burdine* applies to all individual disparate-treatment cases, whether the plaintiff offers direct proof that discrimination motivated the employer's actions or chooses the indirect method of showing that the employer's proffered justification is false, that is to say, a pretext. See *Aikens*, *supra*, at 714, n. 3 ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence"). The plurality is mistaken in suggesting that the plaintiff in a so-called "mixed-motives" case will be disadvantaged by having to "squeeze her proof into *Burdine*'s framework." *Ante*, at 247. As we acknowledged in *McDonnell Douglas*, "[t]he facts necessarily will vary in Title VII cases," and the specification of the prima facie case set forth there "is not necessarily applicable in every respect to differing factual situations." 411 U. S., at 802, n. 13. The framework was "never intended to be rigid, mechanized, or ritualistic." *Aikens*, *supra*, at 715. *Burdine* compels the employer to come forward with its explanation of the decision and permits the plaintiff to offer evidence under either of the logical methods for proof of discrimination. This is hardly a framework that confines the plaintiff; still less is it a justification for saying that the ultimate burden of proof must be on the employer in a mixed-motives case. *Burdine* provides an orderly and adequate way to place both inferential and direct proof before the factfinder for a determination whether intentional discrimination has caused the employment decision. Regardless of the character of the evidence presented, we have consistently held that the ultimate burden "remains at all times with the plaintiff." *Burdine*, *supra*, at 253.

Aikens illustrates the point. There, the evidence showed that the plaintiff, a black man, was far more qualified than any of the white applicants promoted ahead of him. More important, the testimony showed that "the person responsible for the promotion decisions at issue had made numerous derogatory comments about blacks in general and Aikens in particular." 460 U. S., at 713–714, n. 2. Yet the Court in *Aikens* reiterated that the case was to be tried under the proof scheme of *Burdine*. JUSTICE BRENNAN and JUSTICE BLACKMUN concurred to stress that the plaintiff could prevail under the *Burdine* scheme in either of two ways, one of which was directly to persuade the court that the employment decision was motivated by discrimination. 460 U. S., at 718. *Aikens* leaves no doubt that the so-called "pretext" framework of *Burdine* has been considered to provide a flexible means of addressing all individual disparate-treatment claims.

Downplaying the novelty of its opinion, the plurality claims to have followed a "well-worn path" from our prior cases. The path may be well worn, but it is in the wrong forest. The plurality again relies on Title VII's BFOQ provisions, under which an employer bears the burden of justifying the use of a sex-based employment qualification. See *Dothard* v. *Rawlinson*, 433 U. S. 321, 332–337 (1977). In the BFOQ context this is a sensible, indeed necessary, allocation of the burden, for there by definition sex is the but-for cause of the employment decision and the only question remaining is how the employer can justify it. The same is true of the plurality's citations to Pregnancy Discrimination Act cases, *ante*, at 248. In such cases there is no question that pregnancy was the cause of the disputed action. The Pregnancy Discrimination Act and BFOQ cases tell us nothing about the case where the employer claims not that a sex-based decision was justified, but that the decision was not sex-based at all.

Closer analogies to the plurality's new approach are found in *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977), and *NRLB* v. *Transportation Management Corp.*, 462 U. S. 393 (1983), but these cases were decided in different contexts. *Mt. Healthy* was a First Amendment case involving the firing of a teacher, and *Transportation Management* involved review of the NLRB's interpretation of the National Labor Relations Act. The *Transportation Management* decision was based on the deference that the Court traditionally accords NLRB interpretations of the statutes it administers. See 462 U. S., at 402–403. Neither case therefore tells us why the established *Burdine* framework should not continue to govern the order of proof under Title VII.

In contrast to the plurality, JUSTICE O'CONNOR acknowledges that the approach adopted today is a "departure from the *McDonnell Douglas* standard." *Ante*, at 262. Although her reasons for supporting this departure are not without force, they are not dispositive. As JUSTICE O'CONNOR states, the most that can be said with respect to the Title VII itself is that "nothing in the language, history, or purpose of Title VII *prohibits* adoption" of the new approach. *Ante*, at 269 (emphasis added). JUSTICE O'CONNOR also relies on analogies from the common law of torts, other types of Title VII litigation, and our equal protection cases. These analogies demonstrate that shifts in the burden of proof are not unprecedented in the law of torts or employment discrimination. Nonetheless, I believe continued adherence to the *Burdine* framework is more consistent with the statutory mandate. Congress' manifest concern with preventing imposition of liability in cases where discriminatory animus did not actually cause an adverse action, see *ante*, at 262 (opinion of O'CONNOR, J.), suggests to me that an affirmative showing of causation should be required. And the most relevant portion of the legislative history supports just this view. See n. 3, *supra*. The limited benefits that are likely to be produced by today's innovation come at the sacrifice of clarity and practical application.

The potential benefits of the new approach, in my view, are overstated. First, the Court makes clear that the *Price Waterhouse* scheme is applicable only in those cases where the plaintiff has produced direct and substantial proof that an impermissible motive was relied upon in making the decision at issue. The burden shift properly will be found to apply in only a limited number of employment discrimination cases. The application of the new scheme, furthermore, will make a difference only in a smaller subset of cases. The practical importance of the burden of proof is the "risk of nonpersuasion," and the new system will make a difference only where the evidence is so evenly balanced that the factfinder cannot say that either side's explanation of the case is "more likely" true. This category will not include cases in which the allocation of the burden of proof will be dispositive because of a complete lack of evidence on the causation issue. Cf. *Summers* v. *Tice*, 33 Cal. 2d 80, 199 P. 2d 1 (1948) (allocation of burden dispositive because no evidence of which of two negligently fired shots hit plaintiff). Rather, *Price Waterhouse* will apply only to cases in which there is substantial evidence of reliance on an impermissible motive, as well as evidence from the employer that legitimate reasons supported its action.

Although the *Price Waterhouse* system is not for every case, almost every plaintiff is certain to ask for a *Price Waterhouse* instruction, perhaps on the basis of "stray remarks" or other evidence of discriminatory animus. Trial and appellate courts will therefore be saddled with the task of developing standards for determining when to apply the burden shift. One of their new tasks will be the generation of a jurisprudence of the meaning of "substantial factor." Courts will also be required to make the often subtle and difficult distinction between "direct" and "indirect" or "circumstantial" evidence. Lower courts long have had difficulty applying *McDonnell Douglas* and *Burdine*. Addition of a second burden-shifting mechanism, the application of which itself depends on assessment of credibility and a determination whether evidence is sufficiently direct and substantial, is not likely to lend clarity to the process. The presence of an existing burden-shifting mechanism distinguishes the individual disparate-treatment case from the tort, class-action discrimination, and equal protection cases on which

JUSTICE O'CONNOR relies. The distinction makes JUSTICE WHITE's assertions that one "need look only to" *Mt. Healthy* and *Transportation Management* to resolve this case, and that our Title VII cases in this area are "inapposite," *ante*, at 258–260, at best hard to understand.

Confusion in the application of dual burden-shifting mechanisms will be most acute in cases brought under 42 U. S. C. § 1981 or the Age Discrimination in Employment Act (ADEA), where courts borrow the Title VII order of proof for the conduct of jury trials. See, *e. g.*, Note, The Age Discrimination in Employment Act of 1967 and Trial by Jury: Proposals for Change, 73 Va. L. Rev. 601 (1987) (noting high reversal rate caused by use of Title VII burden shifting in a jury setting). Perhaps such cases in the future will require a bifurcated trial, with the jury retiring first to make the credibility findings necessary to determine whether the plaintiff has proved that an impermissible factor played a substantial part in the decision, and later hearing evidence on the "same decision" or "pretext" issues. Alternatively, perhaps the trial judge will have the unenviable task of formulating a single instruction for the jury on all of the various burdens potentially involved in the case.

I do not believe the minor refinement in Title VII procedures accomplished by today's holding can justify the difficulties that will accompany it. Rather, I "remain confident that the *McDonnell Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination." *Burdine*, 450 U. S., at 258. Although the employer does not bear the burden of persuasion under *Burdine*, it must offer clear and reasonably specific reasons for the contested decision, and has every incentive to persuade the trier of fact that the decision was lawful. *Ibid.* Further, the suggestion that the employer should bear the burden of persuasion due to superior access to evidence has little force in the Title VII context, where the liberal discovery rules available to all litigants are supplemented by EEOC investigatory files. *Ibid.*

In sum, the *Burdine* framework provides a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination," *Aikens*, 460 U. S., at 715, and it should continue to govern the order of proof in Title VII disparate-treatment cases.[4]

III

The ultimate question in every individual disparate-treatment case is whether discrimination caused the particular decision at issue. Some of the plurality's comments with respect to the District Court's findings in this case, however, are potentially misleading. As the plurality notes, the District Court based its liability determination on expert evidence that some evaluations of respondent Hopkins were based on unconscious sex stereotypes,[5] and on the fact that

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[4] The plurality states that it disregards the special context of affirmative action. *Ante*, at 239, n. 3. It is not clear that this is possible. Some courts have held that in a suit challenging an affirmative-action plan, the question of the plan's validity need not be reached unless the plaintiff shows that the plan was a but-for cause of the adverse decision. See *McQuillen* v. *Wisconsin Education Association Council*, 830 F. 2d 659, 665 (CA7 1987), cert. denied, 485 U. S. 914 (1988). Presumably it will be easier for a plaintiff to show that consideration of race or sex pursuant to an affirmative-action plan was a substantial factor in a decision, and the court will need to move on to the question of a plan's validity. Moreover, if the structure of the burdens of proof in Title VII suits is to be consistent, as might be expected given the identical statutory language involved, today's decision suggests that plaintiffs should no longer bear the burden of showing that affirmative-action plans are illegal. See *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616, 626–627 (1987).

[5] The plaintiff who engages the services of Dr. Susan Fiske should have no trouble showing that sex discrimination played a part in any decision. Price Waterhouse chose not to object to Fiske's testimony, and at this late stage we are constrained to accept it, but I think the plurality's enthusiasm for Fiske's conclusions unwarranted. Fiske purported to discern stereotyping in comments that were gender neutral—*e. g.*, "overbearing and abrasive"—without any knowledge of the comments' basis in reality and without having met the speaker or subject. "To an expert of Dr. Fiske's qualifications, it seems plain that no woman could *be* overbearing, arrogant, or abrasive: any observations to that effect would necessarily

Price Waterhouse failed to disclaim reliance on these comments when it conducted the partnership review. The District Court also based liability on Price Waterhouse's failure to "make partners sensitive to the dangers [of stereotyping], to discourage comments tainted by sexism, or to investigate comments to determine whether they were influenced by stereotypes." 618 F. Supp. 1109, 1119 (DC 1985).

Although the District Court's version of Title VII liability is improper under any of today's opinions, I think it important to stress that Title VII creates no independent cause of action for sex stereotyping. Evidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent. The ultimate question, however, is whether discrimination caused the plaintiff's harm. Our cases do not support the suggestion that failure to "disclaim reliance" on stereotypical comments itself violates Title VII. Neither do they support creation of a "duty to sensitize." As the dissenting judge in the Court of Appeals observed, acceptance of such theories would turn Title VII "from a prohibition of discriminatory conduct into an engine for rooting out sexist thoughts." 263 U. S. App. D. C. 321, 340, 825 F. 2d 458, 477 (1987) (Williams, J., dissenting).

Employment discrimination claims require factfinders to make difficult and sensitive decisions. Sometimes this may mean that no finding of discrimination is justified even though a qualified employee is passed over by a less than admirable employer. In other cases, Title VII's protections properly extend to plaintiffs who are by no means model employees. As JUSTICE BRENNAN notes, *ante*, at 258, courts do not sit to determine whether litigants are nice. In this

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be discounted as the product of stereotyping. If analysis like this is to prevail in federal courts, no employer can base any adverse action as to a woman on such attributes." 263 U. S. App. D. C. 321, 340, 825 F. 2d 458, 477 (1987) (Williams, J., dissenting). Today's opinions cannot be read as requiring factfinders to credit testimony based on this type of analysis. See also *ante*, at 277 (opinion of O'CONNOR, J.).

case, Hopkins plainly presented a strong case both of her own professional qualifications and of the presence of discrimination in Price Waterhouse's partnership process. Had the District Court found on this record that sex discrimination caused the adverse decision, I doubt it would have been reversible error. Cf. *Aikens*, *supra*, at 714, n. 2. That decision was for the finder of fact, however, and the District Court made plain that sex discrimination was not a but-for cause of the decision to place Hopkins' partnership candidacy on hold. Attempts to evade tough decisions by erecting novel theories of liability or multitiered systems of shifting burdens are misguided.

IV

The language of Title VII and our well-considered precedents require this plaintiff to establish that the decision to place her candidacy on hold was made "because of" sex. Here the District Court found that the "comments of the individual partners and the expert evidence of Dr. Fiske do not prove an intentional discriminatory motive or purpose," 618 F. Supp., at 1118, and that "[b]ecause plaintiff has considerable problems dealing with staff and peers, the Court cannot say that she would have been elected to partnership if the Policy Board's decision had not been tainted by sexually based evaluations," *id.*, at 1120. Hopkins thus failed to meet the requisite standard of proof after a full trial. I would remand the case for entry of judgment in favor of Price Waterhouse.

MALLARD *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 87–1490. Argued February 28, 1989—Decided May 1, 1989

Petitioner Mallard, an attorney recently admitted to practice before the District Court, was selected to represent indigent inmates in their suit in that court against prison officials under 42 U. S. C. § 1983. After a Magistrate denied his motion to withdraw, he appealed to the District Court, contending that forcing him to represent indigent inmates in a complex action requiring trial skills he did not possess would compel him to violate his ethical obligation to take on only those cases he could handle competently and would exceed the court's authority under 28 U. S. C. § 1915(d), which provides that federal courts may "request" an attorney to represent any person claiming *in forma pauperis* status. The court upheld the Magistrate's decision, ruling, *inter alia*, that § 1915(d) empowers federal courts to make compulsory appointments in civil actions. The Court of Appeals denied without opinion Mallard's petition for a writ of mandamus to compel the District Court to allow his withdrawal.

Held:

1. Section 1915(d) does not authorize a federal court to require an unwilling attorney to represent an indigent litigant in a civil case. The section's operative term is "request," which bespeaks an intent not to authorize mandatory appointments of counsel. The fact that § 1915(c)—which was adopted at the same time as § 1915(d)—imposes mandatory duties on court officers and witnesses in *in forma pauperis* cases demonstrates that Congress knew how to require service when it deemed compulsory service appropriate. The conclusion that § 1915(d) evinces a desire to permit attorneys to decline representation of indigent litigants if in their view their personal, professional, or ethical concerns bid them do so is bolstered by the fact that Congress, when it passed § 1915(d) in 1892, was aware of, but chose not to replicate, the language of various state statutes providing for the "appointment" or "assignment" of counsel in *in forma pauperis* proceedings; by the fact that no reported pre-1892 American or English decision held that a lawyer could be sanctioned for declining representation without compensation; and by the fact that other pre- and post-1892 federal statutes providing for court-ordered representation specify that the court could "assign" or "appoint" attor-

neys, rather than merely "request" that they serve. Contrary to respondents' assertion, construing § 1915(d) to allow courts to ask but not compel lawyers to represent indigent litigants does not render the section a nullity on the theory that statutory authorization is unnecessary for a court simply to ask, since the section may meaningfully be read to legitimize a court's request and therefore to confront a lawyer with an important ethical decision. Pp. 300–308.

2. Mallard discharged his burden of proving that he was entitled to a writ of mandamus, and the Court of Appeals erred when it denied his application. In resting its decision solely on § 1915(d), the District Court plainly acted beyond its "jurisdiction." In addition, Mallard had no alternative remedy available to him. Moreover, the principal reasons for this Court's reluctance to condone use of the writ—the undesirability of making a district court judge a litigant and the inefficiency of piecemeal appellate litigation—are not present here. Pp. 308–310.

3. Respondents' contention that the federal courts possess inherent authority to require lawyers to serve will not be considered by this Court, since the lower courts did not invoke such authority in reaching their decisions. P. 310.

Reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, SCALIA, and KENNEDY, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 310. STEVENS, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined, *post*, p. 311.

John E. Mallard, *pro se*, argued the cause and filed briefs for petitioner.

Gordon E. Allen, Deputy Attorney General of Iowa, argued the cause for respondents. With him on the brief were *Thomas J. Miller*, Attorney General, and *Steve St. Clair*, Assistant Attorney General.*

**Diane C. Yu* and *Jack W. Londen* filed a brief for the State Bar of California as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Association of the Bar of the City of New York by *Alexander R. Sussman*, *Ogden Northrop Lewis*, and *John G. Koeltl;* and for the Legal Services Corporation of Iowa by *Martin Ozga*.

Gerald F. Uelmen and *Ephraim Margolin* filed a brief for California Attorneys for Criminal Justice et al. as *amici curiae*.

JUSTICE BRENNAN delivered the opinion of the Court.

We are called upon to decide whether 28 U. S. C. § 1915(d) authorizes a federal court to require an unwilling attorney to represent an indigent litigant in a civil case. We hold that it does not.

I

Section 1915(d) provides: "The court may request an attorney to represent any [person claiming *in forma pauperis* status] unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." In *Nelson* v. *Redfield Lithograph Printing*, 728 F. 2d 1003, 1005 (1984), the Court of Appeals for the Eighth Circuit ordered "the chief judge of each district to seek the cooperation of the bar associations and the federal practice committees of the judge's district to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations," such as *in forma pauperis* proceedings conducted under 28 U. S. C. § 1915. The District Court for the Southern District of Iowa heeded the Court of Appeals' command. Under the system in force since February 1986, once the District Court has determined that an indigent party qualifies for representation under § 1915(d), the Clerk of the Court forwards a copy of the court file to the Volunteer Lawyers Project (VLP), a joint venture of the Legal Services Corporation of Iowa and the Iowa State Bar Association. The VLP keeps a copy of a roster prepared by the District Court of all attorneys admitted to practice before the court and in good standing. After deleting the names of lawyers who have volunteered for VLP referrals of *pro bono* state-court cases, the VLP selects lawyers from the list nonalphabetically for § 1915(d) assignments.[1] Lawyers who are chosen under the plan may apply to the District Court for reimbursement of out-of-pocket costs. They may also keep any fee award provided by statute, but are not guaranteed even minimal compensation for their own services. The VLP assists lawyers assigned to litigate in areas of the law with which they are unfamiliar by providing written materials, holding periodic seminars, and facilitating consultations with experienced attorneys.

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[1] In February 1986, the Iowa State Bar Association sent a letter to all lawyers licensed to practice before the United States District Courts for the Northern and Southern Districts of Iowa describing the referral system. According to the letter, 130 appointments were made between June

Petitioner Mallard was admitted to practice before the District Court in January 1987, and entered his first appearance the following month. In June 1987 he was asked by the VLP to represent two current inmates and one former inmate who sued prison officials under 42 U. S. C. § 1983, alleging that prison guards and administrators had filed false disciplinary reports against them, mistreated them physically, and endangered their lives by exposing them as informants. After reviewing the case file, Mallard filed a motion to withdraw with the District Court. In his motion, petitioner stated that he had no familiarity with the legal issues presented in the case, that he lacked experience in deposing and cross-examining witnesses, and that he would willingly volunteer his services in an area in which he possessed some expertise, such as bankruptcy and securities law. App. 4–8. The VLP opposed petitioner's motion, claiming that he was competent, that he had an ethical duty to do whatever was necessary to try the case, and that permitting an exception to the rule of assignment would create a dangerous precedent. A Magistrate denied petitioner's motion.

Mallard then appealed to the District Court. Although he reiterated his unfamiliarity with § 1983 actions, he contended that he should be permitted to withdraw not because of his inexperience in interpreting the statute and its case law, but

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1984 and June 1985. The combined lists for both Districts embraced roughly 3,500 lawyers. Each lawyer was eligible to be chosen every third year, making her odds of being selected roughly 1 in 9 in those years. App. to Brief for Respondents 1–5.

because he was not a litigator by training or temperament. Forcing him to represent indigent inmates in a complex action requiring depositions and discovery, cross-examination of witnesses, and other trial skills, Mallard asserted, would compel him to violate his ethical obligation to take on only those cases he could handle competently and would exceed the court's authority under § 1915(d). *Id.*, at 19–29. In an accompanying affidavit, Mallard added: "I do not like the role of confronting other persons in a litigation setting, accusing them of misdeeds, or questioning their veracity. Because of my reluctance to become involved in these activities, I do not feel confident that I would be effective in litigating a case such as the instant case." *Id.*, at 38.

Unmoved, the District Court upheld the Magistrate's decision. App. to Pet. for Cert. 2a–4a. Based on the quality of petitioner's brief in support of his motion to withdraw, the court pronounced him competent, notwithstanding his very slight acquaintance with trial litigation. The court also held that § 1915(d) empowers federal courts to make compulsory appointments in civil actions. In November 1987, Mallard sought a writ of mandamus from the Court of Appeals for the Eighth Circuit to compel the District Court to allow his withdrawal. The Court of Appeals denied the petition without opinion. *Id.*, at 1a. We granted certiorari to resolve a conflict among the Courts of Appeals over whether § 1915(d) authorizes compulsory assignments of attorneys in civil cases.[2] 488 U. S. 815 (1988). We now reverse.

II

Interpretation of a statute must begin with the statute's language. *E. g., United States* v. *Ron Pair Enterprises,*

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[2] Compare, *e. g., Caruth* v. *Pinkney*, 683 F. 2d 1044, 1049 (CA7 1982) (§ 1915(d) does not authorize compulsory appointments), cert. denied, 459 U. S. 1214 (1983); *United States* v. *30.64 Acres of Land*, 795 F. 2d 796, 801–803 (CA9 1986) (same), with, *e. g., Peterson* v. *Nadler*, 452 F. 2d 754, 757 (CA8 1971) (§ 1915(d) permits mandatory assignments); *Whisenant* v. *Yuam*, 739 F. 2d 160, 163, n. 3 (CA4 1984) (same).

Inc., 489 U. S. 235, 241 (1989); *Landreth Timber Co.* v. *Landreth*, 471 U. S. 681, 685 (1985). Section 1915(d)'s operative term is "request": "The court may request an attorney to represent" an indigent litigant. The import of the term seems plain. To request that somebody do something is to express a desire that he do it, even though he may not generally be disciplined or sanctioned if he declines. Of course, somebody who frequently refuses another person's requests might not win that person's favor. A soldier who regularly fails to fulfill his superior's requests might not rise in the ranks as rapidly as would someone who was more compliant. But somebody who refuses a request, as the word is ordinarily used, may not be penalized formally for doing so, as a soldier who disobeyed orders might be court-martialed. In everyday speech, the closest synonyms of the verb "request" are "ask," "petition," and "entreat." See, *e. g.*, Webster's New International Dictionary 1929 (3d ed. 1981); Black's Law Dictionary 1172 (5th ed. 1979). The verbs "require" and "demand" are not usually interchangeable with it.

There is little reason to think that Congress did not intend "request" to bear its most common meaning when it used the word in § 1915(d). Although "request" may double for "demand" or "command" when it is used as a noun, particularly when employed as a term of art in connection with wills, trusts, and probate proceedings, its ordinary and natural signification when used as a verb was precatory when Congress enacted the provision now appearing at 28 U. S. C. § 1915(d) in 1892. See, *e. g.*, Black's Law Dictionary 1027 (1st ed. 1891); 2 B. Abbott, Dictionary of Terms and Phrases Used in American or English Jurisprudence 415 (1879); 7 Judicial and Statutory Definitions of Words and Phrases 6120–6122 (West 1905).

Perhaps the clearest proof that Congress did not intend § 1915(d) to license compulsory appointments of counsel is the contrast between that subsection and § 1915(c). Whereas § 1915(d) merely empowers a court to *request* an attorney to represent a litigant proceeding *in forma pauperis*, § 1915(c)—adopted at the very same time as § 1915(d)—treats court officers and witnesses differently: "The officers of the court *shall* issue and serve all process, and perform all duties in such cases. Witnesses *shall* attend as in other cases, and the same remedies shall be available as are provided for by law in other cases." (Emphasis added.) Congress evidently knew how to require service when it deemed compulsory service appropriate. Its decision to allow federal courts to *request* attorneys to represent impoverished litigants, rather than command, as in the case of court officers, that lawyers *shall* or *must* take on cases assigned to them, bespeaks an intent not to authorize mandatory appointments of counsel.[3]

An examination of state statutes governing *in forma pauperis* proceedings at the time § 1915(d) became law bolsters this conclusion. By the late 19th century, at least 12 States had statutes permitting courts to assign counsel to represent indigent litigants. The Congress that adopted § 1915(d) was undoubtedly aware of those statutes, for the brief and otherwise unilluminating Report of the House Judiciary Committee states that the bill containing § 1915(d) was designed to enable persons unable to afford legal representation to avail themselves of the courts, as "[m]any humane and enlightened States" that had similar laws allowed them to do. H. R. Rep. No. 1079, 52d Cong., 1st Sess., 2 (1892). None of those state statutes, however, provided that a court could merely *request* that an attorney serve without compensation. All of them provided instead that a court could *assign* or *appoint* counsel. Ark. Stat. § 1053 (1884) (assign); Ill. Rev. Stat., ch. 26, § 3 (1845) (assign); Ind. Rev. Stat., Vol. 2, pt. 2, ch. 1, Art. 2, § 15 (1852) (assign); Ky. Stat. § 884 (1915) (Act of May 27, 1892) (assign); Mo. Rev. Stat. § 2918 (1889) (assign); N. J. Gen. Stat., Vol. 2, Practice § 369, p. 2598 (1896) (enacted 1799) (assign); 1876 N. Y. Laws, ch. 448, Art. 3, § 460 (assign); 1869 N. C. Pub. Laws, ch. 96, § 2 (assign); Tenn. Code § 3980 (1858) (appoint and assign); Tex. Rev. Stat., Art. 1125 (1879) (enacted 1846) (appoint); Va. Code Ann. § 3538 (1904) (appeared in 1849 Code) (assign); W. Va. Code, ch. 138, § 1 (1891) (assign). Cf. N. Mex. Comp. Laws § 2289 (1884) (judge may appoint attorney to represent Territory if Territory's attorneys are unable to attend by reason of sickness or inability); Nev. Comp. Laws § 3126 (1900) (court may appoint attorney to appear on behalf of absent defendant in certain contract actions). To the extent that the "assignment" or "appointment" of counsel denotes the imposition of a duty to undertake representation that courts may enforce, Congress' decision to allow the federal courts to do no more than "request" attorneys to serve, in full awareness of more stringent state practices, seems to evince a desire to permit attorneys to decline representation of indigent litigants if in their view their personal, professional, or ethical concerns bid them do so.

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[3] The sole reference to compulsory service in the short floor debate in the House supports this inference. In response to a statement by Representative Stone that the bill would compel court officers to work without pay, Representative Culberson said: "We are simply in these cases of charity and humanity compelling these officers, all of whom make good salaries, to do this work for nothing. That is all the bill does. There may be one such case upon a docket of five hundred; and they are not required to do much *ex-officio* service." 23 Cong. Rec. 5199 (1892). No one spoke of compelling lawyers to serve without compensation.

Moreover, the extent to which state statutes empowering courts to "assign" or "appoint" counsel in *in forma pauperis* proceedings also authorized courts to sanction attorneys who refused to serve without compensation is unclear, because few appointments were made pursuant to those statutes, because many legal proceedings went unrecorded, and because lawyers seem rarely to have balked at courts' assignments. It is nevertheless significant that no reported decision exists in the above States prior to 1892 holding that a lawyer could not decline representation without compensation, see Shapiro, The Enigma of the Lawyer's Duty to Serve, 55

N. Y. U. L. Rev. 735, 749–762 (1980) (hereinafter Shapiro), for it suggests that Congress did not intend to replicate a system of coercive appointments when it enacted § 1915(d), particularly when it used the weaker verb "request" in place of the words "assign" or "appoint." English precedents from the 15th to the late 19th century, on which the States apparently relied and which Congress might have had in mind, were equally murky. Few appointments were made in either civil or criminal cases; and although sergeants-at-law were expected to represent indigent persons upon demand of the court, they held public office and were court officers in a much fuller sense than advocates who appeared before it. Again, no reported decisions involve the imposition of sanctions on lawyers unwilling to serve. See *id.*, at 740–749. Professor Shapiro concludes: "To justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there." *Id.*, at 753.[4]

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[4] In claiming that "state courts had statutory authority to order lawyers to render assistance to indigent civil litigants in a dozen States" in 1892, *post*, at 314, the dissent ignores recent scholarship questioning the extent of that authority and casting doubt on unqualified and poorly documented assertions of its existence by contemporary writers, such as Cooley. See Shapiro 751–753. In view of the complete absence of precedent evincing state courts' power to sanction attorneys unwilling to provide free representation, the dissent's surmise that Congress meant to grant this power to federal judges, and indeed to confer on them as much authority as judges in the "most progressive" States exercised, *post*, at 314, seems somewhat extravagant. Lower federal-court decisions construing § 1915(d) within a decade of its enactment, on which the dissent relies, see *id.*, at 316, certainly do not support this inference. On the contrary, they tell against it. In *Whelan* v. *Manhattan R. Co.*, 86 F. 219, 221 (CC SDNY 1898), cited approvingly a year later regarding attorney assignments in *Brinkley* v. *Louisville & N. R. Co.*, 95 F. 345, 353 (CC WD Tenn. 1899), the court said: "If the attorney who brought the action is willing to continue the litigation [without compensation, unless the plaintiff prevails and recovers an amount sufficient to pay him a fair fee], he will be assigned to represent plaintiff; if not, the court will find some other attorney to prosecute her

Comparing § 1915(d) with similar federal statutes strengthens our conclusion that Congress did not authorize mandatory appointments. The sole federal statute antedating § 1915(d) that provided for court-ordered representation allowed a capital defendant "to make his full defence by counsel learned in the law" and stated that "the court before whom such person shall be tried, or some judge thereof, shall . . . immediately, upon his request . . . *assign* to such person such counsel, not exceeding two, as such person shall de-

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case." Courts at the time evidently believed that attorneys were free to decline a judge's request to represent an indigent plaintiff under § 1915(d).

The dissent's claim that Congress intended § 1915(d) to mirror state statutes permitting coercive appointments seems particularly tenuous when Congress departed from States' use of the verbs "appoint" and "assign," and when it plainly distinguished between attorneys and salaried court officers in the text of the statute. To be sure, the statute was introduced in both Houses as an Act "providing when plaintiff may sue as a poor person, and when counsel shall be assigned by the court." 23 Cong. Rec. 5199, 6264 (1892). But the word "assign" does not appear in the statute itself or the relevant section of the United States Code, and it is the statutory language that guides our resolution of this case. The dicta cited by the dissent, see *post*, at 312–314, regarding lawyers' obligation as members of a bar to represent poor *criminal* defendants do not appreciably strengthen its argument that *this statutory provision* licenses compulsory appointments in *civil* cases, whatever force they might lend to the contention that federal courts possess inherent authority to compel lawyers to serve or that attorneys are under a strong ethical obligation to render assistance.

The dissent's further argument that Mallard's "admission to practice implicitly included an obligation to participate" in the District Court's program for providing representation to indigent civil litigants because the program was established before he joined the bar, see *post*, at 317, is equally unavailing. The District Court's program derived its putative authority from § 1915(d) alone. See *Nelson* v. *Redfield Lithograph Printing*, 728 F. 2d 1003 (CA8 1984). Whether Mallard incurred an obligation to represent indigent civil litigants by virtue of his membership in the bar therefore depends upon whether § 1915(d) in fact authorizes compulsory representation. To argue the reverse—that Mallard assumed an obligation by accepting membership in the bar after the program was in place, hence the program, and derivatively Mallard's obligation, must have a legitimate statutory ground in § 1915(d)—is simply bootstrapping.

sire. . . ." Act of April 30, 1790, ch. 9, § 29, 1 Stat. 118, presently codified as amended at 18 U. S. C. § 3005 (emphasis added). Thus, when Congress enacted § 1915(d), the verb "assign" was already part of the federal statutory lexicon; Congress' decision to depart from prior usage in fashioning a rule for civil cases[5] involving indigent litigants might be taken to display a reluctance to require attorneys to serve, even though Congress apparently mandated service in the much more serious case of criminal defendants facing the death penalty.[6]

This inference finds additional support in Congress' actions subsequent to § 1915(d)'s enactment. Every federal statute still in force that was passed after 1892 and that authorizes courts to provide counsel states that courts may "assign" or "appoint" attorneys, just as did the 1790 capital representation statute. See 18 U. S. C. § 3006A (1982 ed. and Supp. V) (appoint; criminal defendant); 18 U. S. C. § 3503(c) (assign; criminal defendant at deposition to preserve testimony); 18 U. S. C. § 4109 (appoint; proceeding to verify offender's consent to transfer to or from United States); 25 U. S. C. § 1912(b) (appoint; Indian child custody proceedings); 42 U. S. C. § 1971(f) (assign; defendant in voting rights case); 42

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[5] Although § 1915(d) now pertains to "the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein," 28 U. S. C. § 1915(a), as originally drafted it apparently applied only to suits commenced by an indigent person. Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252. Since a private individual may not institute a criminal prosecution, the scope of § 1915(d) was limited to persons bringing civil suits. The legislative history of the bill containing § 1915(d) corroborates this inference. The House Report refers exclusively to litigation over property. See H. R. Rep. No. 1079, 52d Cong., 1st Sess., 1 (1892). And the floor debate in the House speaks only of poor persons suing as plaintiffs. See 23 Cong. Rec. 5199 (1892).

[6] We do not decide today whether, or under what conditions, 18 U. S. C. § 3005 or any other federal statute providing for the "assignment" or "appointment" of counsel authorizes federal courts to compel an unwilling attorney to render service. Nor do we offer an opinion on the constitutionality of compulsory assignments.

U. S. C. § 2000a–3(a) (appoint; complainant seeking injunction under civil rights laws); 42 U. S. C. § 2000e–5(f)(1) (appoint; Title VII complainant); 42 U. S. C. § 3413(1) (assign; commitment of narcotics addict); see also Fed. Rule Crim. Proc. 44 (assign; criminal defendant); cf. 10 U. S. C. § 827 (courts-martial shall "detail" trial counsel and defense counsel). Congress' decision to promulgate these apparently coercive representation statutes when § 1915(d) was already on the books and after it had been extended to cover criminal as well as civil cases, see Act of June 25, 1910, Pub. L. 317, ch. 435, 36 Stat. 866,[7] suggests that § 1915(d)'s use of "request" instead of "assign" or "appoint" was understood to signify that § 1915(d) did not authorize compulsory appointments. In any case, Congress' enactments after 1892 afford no reason to believe that the plain meaning of § 1915(d) is not its intended meaning.

Contrary to respondents' assertion, Brief for Respondents 7–9, construing § 1915(d) to allow courts to ask but not compel lawyers to represent indigent litigants does not render § 1915(d) a nullity. Respondents contend that statutory authorization is unnecessary for a court simply to ask an attorney to represent someone; § 1915(d) would be superfluous if it did no more than that, and thus it must be read to confer coercive power upon the federal courts. Respondents' major premise, however, is too strong. Statutory provisions may simply codify existing rights or powers. Section 1915(d), for example, authorizes courts to dismiss a "frivolous or malicious" action, but there is little doubt they would have power to do so even in the absence of this statutory provision. Nor do respondents' premises compel their conclusion. Section 1915(d) plays a useful role in the statutory scheme if it informs lawyers that the court's requests to provide legal assistance are *appropriate* requests, hence not to be ignored or disregarded in the mistaken belief that they are improper, like a judge's request to cut short cross-examination so that he can go fishing. Section 1915(d) may meaningfully be read to legitimize a court's request to represent a poor litigant and therefore to confront a lawyer with an important ethical decision; one need not interpret it to authorize the imposition of sanctions should a lawyer decide not to serve in order to give purpose to the provision.[8]

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[7] These federal statutes empowering courts to assign or appoint counsel were all passed well after § 1915 attained its present broad coverage. See Act of Aug. 10, 1956, Pub. L. 1028, § 827, 70A Stat. 46, 10 U. S. C. § 827; Pub. L. 88–455, 78 Stat. 552 (1964), 18 U. S. C. § 3006A; Pub. L. 91–452, 84 Stat. 934 (1970), 18 U. S. C. § 3503(c); Pub. L. 95–144, 91 Stat. 1218 (1977), 18 U. S. C. § 4109; Pub. L. 95–608, 92 Stat. 3071 (1978), 25 U. S. C. § 1912(b); Pub. L. 88–352, 78 Stat. 241 (1964), 42 U. S. C. § 1971(f); Pub. L. 88–352, 78 Stat. 244 (1964), 42 U. S. C. § 2000a–3(a); Pub. L. 88–352, 78 Stat. 259 (1964), 42 U. S. C. § 2000e–5(f)(1); Pub. L. 89–793, 80 Stat. 1445 (1966), 42 U. S. C. § 3413(1).

III

Mallard's petition to this Court followed the Court of Appeals' denial of his application for a writ of mandamus. "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943). See also *Will* v. *Calvert Fire Ins. Co.*, 437 U. S. 655, 661 (1978); *Kerr* v. *United States District Court for Northern District of California*, 426 U. S. 394, 402 (1976); *Will* v. *United States*, 389 U. S. 90, 95 (1967). Mallard alleged that the District Court did not lawfully exercise its jurisdiction in appointing him and that the Court of Appeals should therefore order the District Court to grant his motion to dismiss his appointment; he did not seek to compel the District Court to exercise some authority it wrongfully declined to use. Although "we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction,'" *Kerr, supra,* at 402; see *Will* v. *United States, supra,* at 95, we have required that petitioners demonstrate a "clear abuse of discretion," *Bankers Life & Casualty Co.* v. *Holland,* 346 U. S. 379, 383 (1953), or conduct amounting to "usurpation of [the judicial] power," *De Beers Consolidated Mines, Ltd.* v. *United States,* 325 U. S. 212, 217 (1945), to be entitled to issuance of the writ. To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack adequate alternative means to obtain the relief they seek, see, *e. g., Kerr, supra,* at 403; *Allied Chemical Corp.* v. *Daiflon, Inc.,* 449 U. S. 33, 35 (1980) *(per curiam),* and carry "the burden of showing that [their] right to issuance of the writ is 'clear and indisputable,'" *Bankers Life, supra,* at 384, quoting *United States* v. *Duell,* 172 U. S. 576, 582 (1899).

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[8] Although we do not reach the question whether the federal courts have inherent authority to order attorneys to represent litigants without pay, see Part IV, *infra*, it bears noting that if respondents' argument regarding the function of § 1915(d) were correct, it would seriously undermine respondents' assertion that the federal courts possess inherent power to direct unwilling lawyers to serve. If the federal courts already had the authority to compel representation, then by respondents' reasoning § 1915(d) would have been otiose; respondents would therefore have to conclude, it seems, that the federal courts lacked inherent authority to sanction lawyers for failing to heed the courts' orders to provide legal counsel free of charge.

Mallard met this demanding standard. In resting its decision solely on § 1915(d)—the only ground for decision properly before us—the District Court plainly acted beyond its "jurisdiction" as our decisions have interpreted that term, for, as we decide today, § 1915(d) does not authorize coercive appointments of counsel. In addition, Mallard had no alternative remedy available to him. And the principal reasons for our reluctance to condone use of the writ—the undesirability of making a district court judge a litigant and the inefficiency of piecemeal appellate litigation, see, *e. g., Kerr, supra,* at 402–403; *Allied Chemical Corp., supra,* at 35—are not present here. The District Court Judge was never made a party to this action, nor did Mallard's petition attempt to sever one element of the merits litigation from the rest.

Thus, Mallard discharged his burden of proving that he was entitled to a writ of mandamus, and the Court of Appeals erred when it denied his application.

IV

We emphasize that our decision today is limited to interpreting § 1915(d). We do not mean to question, let alone denigrate, lawyers' ethical obligation to assist those who are too poor to afford counsel, or to suggest that requests made pursuant to § 1915(d) may be lightly declined because they give rise to no ethical claim. On the contrary, in a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills *pro bono publico* is manifest. Nor do we express an opinion on the question whether the federal courts possess inherent authority to require lawyers to serve. Although respondents and their *amici* urge us to affirm the Court of Appeals' judgment on the ground that the federal courts do have such authority, the District Court did not invoke its inherent power in its opinion below, and the Court of Appeals did not offer this ground for denying Mallard's application for a writ of mandamus. We therefore leave that issue for another day. We hold only that § 1915(d) does not authorize the federal courts to make coercive appointments of counsel. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE KENNEDY, concurring.

Our decision today speaks to the interpretation of a statute, to the requirements of the law, and not to the professional responsibility of the lawyer. Lawyers, like all those who practice a profession, have obligations to their calling which exceed their obligations to the State. Lawyers also have obligations by virtue of their special status as officers of the court. Accepting a court's request to represent the indigent is one of those traditional obligations. Our judgment here does not suggest otherwise. To the contrary, it is precisely because our duties go beyond what the law demands that ours remains a noble profession.

I join in full the opinion of the Court.

JUSTICE STEVENS, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE O'CONNOR join, dissenting.

The relationship between a court and the members of its bar is not defined by statute alone. The duties of the practitioner are an amalgam of tradition, respect for the profession, the inherent power of the judiciary, and the commands that are set forth in canons of ethics, rules of court, and legislative enactments. This case involves much more than the parsing of the plain meaning of the word "request" as used in 28 U. S. C. § 1915(d). This case also does not concern the sufficiency of the lawyer's reasons for declining an appointment[1] or the sanctions that may be imposed on an attorney who refuses to serve without compensation. There are, of course, many situations in which a lawyer may properly decline such representation. He or she may have a conflict of interest, may be engaged in another trial, may already have accepted more than a fair share of the uncompensated burdens that fall upon the profession, or may not have the qualifications for a particular assignment. As this case comes to us, however, the question is whether a lawyer may seek relief by way of mandamus from the court's request simply because he would rather do something else with his time. For me, the answer is quite plain.

A few weeks ago we held that the Virgin Islands Bar could not exclude nonresidents from its membership. See *Bar-*

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[1] The petitioner tried to persuade the Magistrate that he had valid reasons for not wanting to represent convicted felons in litigation against their prison guards, but those reasons were found insufficient by the District Court, see App. to Pet. for Cert. 2a–3a, and this Court does not question the accuracy of that finding.

nard v. *Thorstenn*, 489 U. S. 546 (1989). In that case, we expressly recognized the legitimacy of the bar's interest in requiring its entire membership to share in the burdens of providing representation to indigent defendants in criminal cases.[2] *Id.*, at 557–558. That recognition reflects the fact that a court's power to require a lawyer to render assistance to the indigent is firmly rooted in the authority to define the terms and conditions upon which members are admitted to the bar, *Frazier* v. *Heebe*, 482 U. S. 641 (1987); *United States* v. *Hvass*, 355 U. S. 570 (1958),[3] and to exercise "those powers necessary to protect the functioning of its own processes." *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 821 (1987) (SCALIA, J., concurring in judgment). Cf. *Sparks* v. *Parker*, 368 So. 2d 528 (Ala.) (rejecting constitutional challenges to compelled representation of indigent defendants), appeal dism'd, 444 U. S. 803 (1979). The lawyer's duty to provide professional assistance to the poor is part of the ancient traditions of the bar long recognized by this Court and the courts of the several States.[4] As Justice Field, then sitting on the California Supreme Court, declared more than a century ago:

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[2] We stated:

"The final reason offered by petitioners for Rule 56(b)'s residency requirements is somewhat more substantial, though ultimately unavailing. Under District Court Rule 16, each active member of the Virgin Island Bar must remain available to accept appointments to appear on behalf of indigent criminal defendants. According to the affidavit of the President of the Virgin Islands Bar Association, each member can expect to receive appointments about four times per year. Once appointed, it is the duty of the lawyer 'to communicate with the defendant at his place of incarceration as promptly as possible and not later than five days from the date of the clerk's mailing of the order of appointment.' Although the statute does not specifically so provide, the District Court interprets Rule 16 to require that only the appointed attorney may appear on behalf of the criminal defendant. The District Court found that, in light of this individual appearance requirement and the strict time constraints imposed by the Speedy Trial Act, 18 U. S. C. §§ 3161–3174, it would be virtually impossible for this system of appointed counsel to work with nonresident attorneys.

. . . . .

"As respondents point out, if handling indigent criminal cases is a requirement of admission to the Bar, a nonresident knows that he must either appear himself or arrange with a resident lawyer to handle the case when he is unavailable. If the nonresident fails to make all arrangements necessary to protect the rights of the defendant, the District Court may take appropriate action. This possibility does not, however, justify a blanket exclusion of nonresidents." *Barnard* v. *Thorstenn*, 489 U. S. 546, 557–558 (1989) (citations omitted).

[3] See, *e. g.*, *Supreme Court of New Hampshire* v. *Piper*, 470 U. S. 274, 287 (1985) ("Furthermore, a nonresident bar member, like the resident member, could be required to represent indigents and perhaps to participate in formal legal-aid work").

> "[I]t is part of the general duty of counsel to render their professional services to persons accused of crime, who are destitute of means, upon the appointment of the Court, when not inconsistent with their obligations to others; and for compensation, they must trust to the possible future ability of the parties. Counsel are not considered at liberty to reject, under circumstances of this

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[4] Justice Cardozo stated for the New York Court of Appeals:

"'Membership in the bar is a privilege burdened with conditions.' The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice. His co-operation with the court was due whenever justice would be imperilled if co-operation was withheld. He might be assigned as counsel for the needy, in causes criminal or civil, serving without pay." *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 470–471, 162 N. E. 487, 489 (1928) (citation omitted).

Cf. E. Brown, Lawyers and the Promotion of Justice 253–254 (1938) ("Because the lawyer is bound by his professional oath to render gratuitous service to poor persons, it has long been customary for the court to assign counsel to those who cannot furnish their own attorney"); H. Drinker, Legal Ethics 62–63 (1963); R. Smith, Justice and the Poor 100 (1967) ("In addition to the inherent power of courts to assign attorneys, on the general theory that they are agents of the court and ministers of justice, there are statutes in many jurisdictions expressly conferring this authority on the judges, to be used in their discretion").

> character, the cause of the defenseless, because no provision for their compensation is made by law." *Rowe* v. *Yuba County*, 17 Cal. 61, 63 (1860).

Or, as Justice Sutherland declared for the Court more recently: "Attorneys are officers of the court, and are bound to render service when required by such an appointment." *Powell* v. *Alabama*, 287 U. S. 45, 73 (1932).

Section 1915(d) embodies this authority to order counsel to represent indigent litigants even if it does not exhaust it. The statute was passed to give federal courts the same authority to allow *in forma pauperis* actions that the courts in the most progressive States exercised. In 1892, state courts had statutory authority to order lawyers to render assistance to indigent civil litigants in a dozen States, *ante*, at 304, and common-law power to appoint counsel in at least another 10 States.[5] Congress intended to "open the United States

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[5] See *Rowe* v. *Yuba County*, 17 Cal. 61, 63 (1860); *Lamont* v. *Solano County*, 49 Cal. 158 (1874); *Elam* v. *Johnson*, 48 Ga. 348 (1873); *Hall* v. *Washington County*, 2 Greene 473, 476 (Iowa 1850); *Case* v. *Board of County Comm'rs of Shawnee County*, 4 Kan. 511 (1868); *State* v. *Simmons*, 43 La. Ann. 991, 10 So. 382 (1891); *Bacon* v. *Wayne County*, 1 Mich. 461 (1850); *Dismukes* v. *Board of Supervisors of Noxubee County*, 58 Miss. 612 (1881); *Johnston* v. *Lewis and Clarke County*, 2 Mont. 159 (1874); *House* v. *Whitis*, 64 Tenn. 690 (1875); *Dane County* v. *Smith*, 13 Wis. 585, 587 (1861). See also *Heckman* v. *Mackey*, 32 F. 574 (CC SDNY 1887) (noting that "[t]he practice of allowing paupers to have original writs and subpoenas *gratis*, and to have counsel and attorney assigned them without fee, and to be excused from paying costs when plaintiffs, dates back to the reign of Henry VII"). In his treatise on Constitutional Limitations written in 1868, Professor Cooley wrote:

"[T]he humanity of the law has provided that, if the prisoner is unable to employ counsel, the court may designate some one to defend him who shall be paid by the government; but when no such provision is made, it is a duty which counsel so designated owes to his profession, to the court engaged in the trial, and to the cause of humanity and justice, not to withhold his assistance nor spare his best exertions, in the defence of one who has the double misfortune to be stricken by poverty and accused of crime. No one is at liberty to decline such an appointment, and few, it is to be hoped, would courts" to impoverished litigants and "to keep pace" with the laws of these "[m]any humane and enlightened States." H. R. Rep. No. 1079, 52d Cong., 1st Sess., 1–2 (1892). Congress also intended to ensure that the rights of litigants suing diverse parties in the most liberal of these States would not be defeated by the defendant's removal of the suit to federal court. *Id.*, at 1. To be faithful to the congressional design of ensuring the poor litigant equal justice whether the suit is prosecuted in federal or state court, the statute should be construed to require counsel to serve, absent good reason, when requested to do so by the court. The Court's niggardly construction to the contrary departs from the enlightened laws that Congress intended to track and defeats Congress' beneficent purpose.[6]

I attach no particular significance to the difference, if any, between the ordinary meaning of the word "request" used in § 1915(d) and "assign" and "appoint" used in the various state statutes. See *ante*, at 302–303. The federal statute was introduced in the House and the Senate as an Act empowering

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be disposed to do so." T. Cooley, Constitutional Limitations 334 (2d ed. 1871) (footnote omitted).

In a footnote, Cooley added:

"[A] court has the right to require the service whether compensation is to be made or not; and that counsel who should decline to perform it, for no other reason than that the law does not provide pecuniary compensation, is unworthy to hold his responsible office in the administration of justice." *Id.*, at 334, n. 1.

[6] The Court's reliance on a recent law review article that casts doubt on the power of state courts to sanction attorneys who refused to represent indigents largely misses the point. In its present posture, arising on petitioner's request for a writ of mandamus, the question in this case involves a court's power to order an attorney to represent an indigent party, not its power to sanction an attorney who fails to obey that order. Justices Cardozo, Field, and Sutherland all recognized that a court has such power and, at the time § 1915(d) was enacted, the state courts routinely appointed counsel who were obliged to serve. It is that understanding, against which Congress legislated, rather than any "recent scholarship," *ante*, at 304, n. 4, that should guide our construction of this statute.

courts to "assign" counsel for poor persons, 23 Cong. Rec. 5199, 6264 (1892), and uses the terms "assign" and "request" interchangeably. Significantly, it is entitled "An Act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court." Ch. 209, 27 Stat. 252. Every contemporary decision uses the word "assign" to describe the judge's authority to secure counsel for parties under § 1915(d). See *Boyle* v. *Great Northern R. Co.*, 63 F. 539 (CC Wash. 1894); *Whelan* v. *Manhattan R. Co.*, 86 F. 219, 220–221 (CC SDNY 1898); *Brinkley* v. *Louisville & N. R. Co.*, 95 F. 345, 353 (CC WD Tenn. 1899); *Phillips* v. *Louisville & N. R. Co.*, 153 F. 795 (CC ND Ala. 1907), aff'd, 164 F. 1022 (CA5 1908); *United States ex rel. Randolph* v. *Ross*, 298 F. 64 (CA6 1924). It is evident that the drafters of this statute understood these terms to impose similar obligations and simply assumed that members of our profession would perform their assigned tasks when requested to do so by the court.

The notion that this petitioner had an absolute right to have his "motion to withdraw" granted by the District Court—and therefore that a writ of mandamus may properly issue—is completely unacceptable to me. An attorney who has entered an appearance in a case may not withdraw without leave of court because the court's interest in making sure that a litigant is adequately represented and that the orderly prosecution of the lawsuit is not disrupted is paramount to a lawyer's personal interest in terminating a relationship with a client. See, *e. g.*, *Ohntrup* v. *Firearms Center, Inc.*, 802 F. 2d 676 (CA3 1986); *Mekdeci ex rel. Mekdeci* v. *Merrell National Laboratories*, 711 F. 2d 1510, 1521–1522 (CA11 1983). In this unique case the petitioner apparently filed his motion to withdraw without first entering an appearance—thus, the motion might more appropriately have been captioned as a "petition to be excused from performing a nonexistent duty to enter an appearance in a pending case." Indeed, the very fact that the petitioner considered it appropriate to ask the

Magistrate to allow him to "withdraw" is evidence of his recognition of some duty to accept the appointment unless there was a valid excuse for declining it.

The program adopted by the District Court for the Southern District of Iowa to provide representation for indigent litigants was in operation when petitioner became a member of that court's bar. In my opinion his admission to practice implicitly included an obligation to participate in that program.[7] When a court has established a fair and detailed procedure for the assignment of counsel to indigent litigants, a formal request to a lawyer by the court pursuant to that procedure is tantamount to a command.

In context, I would therefore construe the word "request" in § 1915(d) as meaning "respectfully command." If that is not what Congress intended, the statute is virtually meaningless. There is no substance to the Court's speculation that Congress enacted this provision because of a concern that a court's requests to represent a poor litigant might otherwise be "disregarded in the mistaken belief that they are improper." *Ante*, at 308. There is no anecdotal or historical evidence to support this highly improbable speculation.[8]

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[7] "[R]epresentation of indigents under court order, without a fee, is a condition under which lawyers are licensed to practice as officers of the court, and . . . the obligation of the legal profession to serve without compensation has been modified only by statute. An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order." *United States* v. *Dillon*, 346 F. 2d 633, 635 (CA9 1965), cert. denied, 382 U. S. 978 (1966), cited with approval in *Hurtado* v. *United States*, 410 U. S. 578, 589 (1973).

[8] Nor is there substance to the Court's surmise that the passage of the Criminal Justice Act of 1964, 18 U. S. C. § 3006A, and related statutes, indicates that Congress did not intend in 1892 to give the courts authority to require attorneys to render assistance to the indigent. See *ante*, at 305–306. The Criminal Justice Act was enacted precisely because of defects in the system under which an attorney was not "appointed to represent the needy defendant until he is arraigned" and the case was "then committed to

In my opinion Congress gave its endorsement to these judicial "requests," assuming that it would be "unthinkable"[9] for a lawyer to decline without an adequate reason.

I respectfully dissent.

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an attorney who [would] receive no fee for his services or reimbursement for his expenses." S. Rep. No. 346, 88th Cong., 1st Sess., 12 (1963) (letter of Attorney General Robert F. Kennedy to President Kennedy).

[9] See Tr. of Oral Arg. 8. Justice Blackmar of the Missouri Supreme Court expressed precisely my sentiments in dissent from a decision denying the courts of that State the power to compel attorneys to represent indigents in civil cases:

> "I have often served in court appointments, and I am sure that my brethren have also. When a judge said, 'help me out,' I really felt that I had no choice. Perhaps I had in mind the old army maxim that the commanding officer's desire is the subaltern's command. Perhaps I thought that the court could use its coercive power. I found, however, that judges were sensitive when good reasons for declining appointments were advanced, and were willing to explore alternatives. By issuing our absolute writ, we strip the respondent [the trial judge] of her bargaining power." *State ex rel. Scott* v. *Roper*, 688 S. W. 2d 757, 773 (1985).

NEITZKE ET AL. *v.* WILLIAMS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 87–1882. Argued February 22, 1989—Decided May 1, 1989

A provision in the federal *in forma pauperis* statute, 28 U. S. C. § 1915(d), authorizes courts to dismiss an *in forma pauperis* claim if, *inter alia*, "the action is frivolous or malicious." Respondent Williams, a prison inmate, filed a motion to proceed *in forma pauperis* and a complaint under 42 U. S. C. § 1983 in the District Court, charging that prison officials had violated his Eighth Amendment rights by denying him medical treatment and his Fourteenth Amendment due process rights by transferring him without a hearing to a less desirable cell house when he refused to continue working because of his medical condition. The District Court dismissed the complaint *sua sponte* as frivolous under § 1915(d) on the grounds that Williams had failed to state a claim upon which relief could be granted under Federal Rule of Civil Procedure 12(b)(6). The Court of Appeals, holding that the District Court had wrongly equated the standard for failure to state a claim under Rule 12(b)(6) with the more lenient standard for frivolousness under § 1915(d), which permits dismissal only if a petitioner cannot make any rational argument in law or fact entitling him to relief, affirmed the dismissal of the Fourteenth Amendment claim on the ground that a prisoner clearly has no constitutionally protected liberty or property interest in being incarcerated in a particular institution or wing. However, the court reversed the dismissal of the Eighth Amendment claim as to two of the five defendants, declaring itself unable to state with certainty that Williams was unable to make any rational argument to support his claim.

Held: A complaint filed *in forma pauperis* is not automatically frivolous within the meaning of § 1915(d) because it fails to state a claim under Rule 12(b)(6). The two standards were devised to serve distinctive goals and have separate functions. Under Rule 12(b)(6)'s failure-to-state-a-claim standard—which is designed to streamline litigation by dispensing with needless discovery and factfinding—a court may dismiss a claim based on a dispositive issue of law without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one, whereas under § 1915(d)'s frivolousness standard—which is intended to discourage baseless lawsuits—dismissal is proper only if the legal theory (as in Williams' Fourteenth Amendment claim) or the factual contentions lack an arguable basis. The considerable common ground between the two standards does not mean that one invariably encompasses the other, since, where a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal on Rule 12(b)(6) grounds is appropriate, but dismissal on the basis of frivolousness is not. This conclusion flows from § 1915(d)'s role of replicating the function of screening out inarguable claims from arguably meritorious ones played out in the realm of paid cases by financial considerations. Moreover, it accords with the understanding articulated in other areas of law that not all unsuccessful claims are frivolous. It is also consonant with Congress' goal in enacting the *in forma pauperis* statute of assuring equality of consideration for all litigants. To conflate these standards would deny indigent plaintiffs the practical protections of Rule 12(b)(6)—notice of a pending motion to dismiss and an opportunity to amend the complaint before the motion is ruled on—which are not provided when complaints are dismissed *sua sponte* under § 1915(d). Pp. 324–331.

837 F. 2d 304, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Robert S. Spear argued the cause for petitioners. With him on the briefs was *Linley E. Pearson*, Attorney General of Indiana, and *David A. Nowak*, Deputy Attorney General.

George A. Rutherglen, by appointment of the Court, 488 U. S. 939, argued the cause and filed a brief for respondent.

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether a complaint filed *in forma pauperis* which fails to state a claim under Federal Rule of Civil Procedure 12(b)(6) is automatically frivolous within the meaning of 28 U. S. C. § 1915(d). The answer, we hold, is no.

I

On October 27, 1986, respondent Harry Williams, Sr., an inmate in the custody of the Indiana Department of Corrections, filed a complaint under 42 U. S. C. § 1983 in the United States District Court for the Southern District of Indiana, naming five Indiana correctional officials as defendants. App. 38. The complaint alleged that, while at the Indiana State Prison, Williams had been diagnosed by a prison doctor as having a small brain tumor which affected his equilibrium. *Id.*, at 40. Because of this condition, the doctor placed Williams for one year on "medical idle status." A medical report Williams attached to the complaint stated that "[i]t is very likely that he will have this condition for some time to come." *Id.*, at 48.

The complaint further alleged that, when Williams was transferred to the Indiana State Reformatory, he notified the reformatory staff about the tumor and about the doctor's recommendation that he not participate in any prison work program. *Id.*, at 41. Despite this notification, reformatory doctors refused to treat the tumor, *id.*, at 40–41, and reformatory officials assigned Williams to do garment manufacturing work, *id.*, at 42. After Williams' equilibrium problems worsened and he refused to continue working, the reformatory disciplinary board responded by transferring him to a less desirable cell house. *Id.*, at 42–43.

The complaint charged that by denying medical treatment, the reformatory officials had violated Williams' rights under the Eighth Amendment, and by transferring him without a hearing, they had violated his rights under the Due Process Clause of the Fourteenth Amendment. *Id.*, at 44. The complaint sought money damages and declaratory and injunctive relief. *Id.*, at 45–46. Along with the complaint, Williams filed a motion to proceed *in forma pauperis* pursuant to 28 U. S. C. § 1915(a), stating that he had no assets and only prison income. App. 36–37.

The District Court dismissed the complaint *sua sponte* as frivolous under 28 U. S. C. § 1915(d) on the grounds that Williams had failed to state a claim upon which relief could be granted under Federal Rule of Civil Procedure 12(b)(6). Insofar as Williams claimed deficient medical care, his pleadings did not state a claim of "deliberate indifference to [his] serious medical needs," as prisoners' Eighth Amendment claims must under *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976), but instead described a constitutionally noncognizable instance of medical malpractice. *Williams* v. *Faulkner*, Cause No. IP 86–1307-C (SD Ind., Jan. 16, 1987), reprinted at App. 67. Insofar as Williams protested his transfer without a hearing, his pleadings failed to state a due process violation, for a prisoner has no constitutionally protected liberty or property interest in being incarcerated in a particular institution or a particular wing. *Id.*, at 26. The court gave no other reasons for finding the complaint frivolous. On Williams' ensuing motion to vacate the judgment and amend his pleadings, the District Court reached these same conclusions. *Williams* v. *Faulkner*, Cause No. IP 86–1307-C (SD Ind., Mar. 11, 1987), reprinted at App. 29.[1]

The Court of Appeals for the Seventh Circuit affirmed in part and reversed in part. *Williams* v. *Faulkner*, 837 F. 2d 304 (1988). In its view, the District Court had wrongly equated the standard for failure to state a claim under Rule 12(b)(6) with the standard for frivolousness under § 1915(d). The frivolousness standard, authorizing *sua sponte* dismissal of an *in forma pauperis* complaint "only if the petitioner cannot make any rational argument in law or fact which would entitle him or her to relief," is a "more lenient" standard than that of Rule 12(b)(6), the court stated. 837 F. 2d, at 307. Unless there is "'indisputably absent any factual or legal basis'" for the wrong asserted in the complaint, the trial court, "[i]n a close case," should permit the claim to proceed at least to the point where responsive pleadings are required. *Ibid.* (citation omitted).

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[1] Both in its initial ruling and upon the motion to vacate and amend, the District Court also denied Williams leave to proceed *in forma pauperis*. It based this denial exclusively on its finding of frivolousness, stating that Williams had presumptively satisfied § 1915's poverty requirement. *Williams* v. *Faulkner*, Cause No. IP 86–1307-C (SD Ind., Jan. 16, 1987), reprinted at App. 22. In so ruling, the District Court adhered to precedent in the Court of Appeals for the Seventh Circuit to the effect that, if a district court finds a complaint frivolous or malicious, it should not only dismiss the complaint but also retroactively deny the accompanying motion to proceed *in forma pauperis* under § 1915, regardless of the plaintiff's financial status. See *Wartman* v. *Branch 7, Civil Division, County Court, Milwaukee County, Wis.*, 510 F. 2d 130, 134 (1975). Other Circuits, however, treat the decision whether to grant leave to file *in forma pauperis* as a threshold inquiry based exclusively on the movant's poverty. See, *e. g.*, *Franklin* v. *Murphy*, 745 F. 2d 1221, 1226–1227, n. 5 (CA9 1984); *Boyce* v. *Alizaduh*, 595 F. 2d 948, 950–951 (CA4 1979). Because our review is confined to the question whether the complaint in this case is frivolous within the meaning of § 1915(d), we have no occasion to consider the propriety of these varying applications of the statute.

Evaluated under this frivolousness standard, the Court of Appeals held, Williams' Eighth Amendment claims against two of the defendants had been wrongly dismissed. Although the complaint failed to allege the level of deliberate indifference necessary to survive a motion to dismiss under Rule 12(b)(6), at this stage of the proceedings, the court stated, "we cannot state with certainty that Williams is unable to make any rational argument in law or fact to support his claim for relief" against these defendants. 837 F. 2d, at 308. Accordingly, the Court of Appeals reversed and remanded these claims to the District Court.[2] The Court of Appeals affirmed the dismissal of Williams' due process claims as frivolous, however. Because the law is clear that prisoners have no constitutionally protected liberty interest in remaining in a particular wing of a prison, the court stated,

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[2] The two defendants against whom the Eighth Amendment claims were reinstated were Han Chul Choi, a reformatory doctor whom Williams alleged had refused to treat the brain tumor, and Dean Neitzke, who as administrator of the reformatory infirmary was presumptively responsible for ensuring that Williams received adequate medical care. *Williams* v. *Faulkner*, 837 F. 2d 304, 308 (CA7 1988). The Court of Appeals held that Williams' complaint had alleged no personal involvement on the part of the remaining three defendants in his medical treatment, and that these defendants' prison jobs did not justify an "inference of personal involvement in the alleged deprivation of medical care." *Ibid.* Because Williams could thus make no rational argument to support his claims for relief against these officials, the Court of Appeals stated, the District Court had appropriately dismissed those claims as frivolous. *Ibid.*

Williams could make no rational argument in law or fact that his transfer violated due process. *Id.*, at 308–309.

We granted the petition for a writ of certiorari, 488 U. S. 816 (1988), filed by those defendants against whom Williams' claims still stand to decide whether a complaint that fails to state a claim under Rule 12(b)(6) is necessarily frivolous within the meaning of § 1915(d), a question over which the Courts of Appeals have disagreed.[3] We now affirm.

II

The federal *in forma pauperis* statute, enacted in 1892 and presently codified as 28 U. S. C. § 1915, is designed to ensure that indigent litigants have meaningful access to the federal courts. *Adkins* v. *E. I. DuPont de Nemours & Co.*, 335 U. S. 331, 342–343 (1948). Toward this end, § 1915(a) allows a litigant to commence a civil or criminal action in federal court *in forma pauperis* by filing in good faith an affidavit stating, *inter alia*, that he is unable to pay the costs of the lawsuit. Congress recognized, however, that a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits. To prevent such abusive or captious litigation, § 1915(d) authorizes federal courts to dismiss a claim filed *in forma pauperis* "if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." Dismissals on these grounds are often made *sua sponte* prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints. See *Franklin* v. *Murphy*, 745 F. 2d 1221, 1226 (CA9 1984).

The brevity of § 1915(d) and the generality of its terms have left the judiciary with the not inconsiderable tasks of fashioning the procedures by which the statute operates and of giving content to § 1915(d)'s indefinite adjectives.[4] Articulating the proper contours of the § 1915(d) term "frivolous," which neither the statute nor the accompanying congressional reports defines, presents one such task. The Courts of Appeals have, quite correctly in our view, generally adopted as formulae for evaluating frivolousness under § 1915(d) close variants of the definition of legal frivolousness which we articulated in the Sixth Amendment case of *Anders* v. *California*, 386 U. S. 738 (1967). There, we stated that an appeal on a matter of law is frivolous where "[none] of the legal points [are] arguable on their merits." *Id.*, at 744. By logical extension, a complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact. As the Courts of Appeals have recognized, § 1915(d)'s term "frivolous," when applied to a complaint, embraces not only the inarguable legal conclusion, but also the fanciful factual allegation.[5]

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[3] Compare *Brandon* v. *District of Columbia Board of Parole*, 236 U. S. App. D. C. 155, 159, 734 F. 2d 56, 59 (1984), cert. denied, 469 U. S. 1127 (1985), with *Harris* v. *Menendez*, 817 F. 2d 737, 740 (CA11 1987); *Spears* v. *McCotter*, 766 F. 2d 179, 182 (CA5 1985); *Franklin*, *supra*, at 1227; *Malone* v. *Colyer*, 710 F. 2d 258, 261 (CA6 1983).

Where the appellate courts have diverged, however, is on the question whether a complaint which fails to state a claim under Federal Rule of Civil Procedure 12(b)(6) automatically satisfies this frivolousness standard. The petitioning prison officials urge us to adopt such a *per se* reading, primarily on the policy ground that such a reading will halt the "flood of frivolous litigation" generated by prisoners that has swept over the federal judiciary. Brief for Petitioners 7. In support of this position, petitioners note the large and growing number of prisoner civil rights complaints, the burden which disposing of meritless complaints imposes on efficient judicial administration, and the need to discourage prisoners from filing frivolous complaints as a means of gaining a "'short sabbatical in the nearest federal courthouse.'" *Id.*, at 6, quoting *Cruz* v. *Beto*, 405 U. S. 319, 327 (1972) (REHNQUIST, J., dissenting). Because a complaint which states no claim "must be dismissed pursuant to Rule 12(b)(6) anyway," petitioners assert, "delay[ing] this determination until after service of process and a defendant's response only delays the inevitable." Reply Brief for Petitioners 3.

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[4] See, *e. g.*, Catz & Guyer, Federal In Forma Pauperis Litigation: In Search of Judicial Standards, 31 Rutgers L. Rev. 655 (1978); Feldman, Indigents in the Federal Courts: The In Forma Pauperis Statute—Equality and Frivolity, 54 Ford. L. Rev. 413 (1985).

[5] See, *e. g.*, *Payne* v. *Lynaugh*, 843 F. 2d 177, 178 (CA5 1988); *Franklin*, 745 F. 2d, at 1227–1228; *Johnson* v. *Silvers*, 742 F. 2d 823, 824 (CA4 1984); *Brandon*, *supra*, at 159, 734 F. 2d, at 59; *Wiggins* v. *New Mexico State Supreme Court Clerk*, 664 F. 2d 812, 815 (CA10 1981), cert. denied, 459 U. S. 840 (1982).

We recognize the problems in judicial administration caused by the surfeit of meritless *in forma pauperis* complaints in the federal courts, not the least of which is the possibility that meritorious complaints will receive inadequate attention or be difficult to identify amidst the overwhelming number of meritless complaints. See Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610, 611 (1979). Nevertheless, our role in appraising petitioners' reading of § 1915(d) is not to make policy, but to interpret a statute. Taking this approach, it is evident that the failure-to-state-a-claim standard of Rule 12(b)(6) and the frivolousness standard of § 1915(d) were devised to serve distinctive goals, and that while the overlap between these two standards is considerable, it does not follow that a complaint which falls afoul of the former standard will invariably fall afoul of the latter. Appealing though petitioners' proposal may appear as a broadbrush means of pruning meritless complaints from the federal docket, as a matter of statutory construction it is untenable.

Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. *Hishon* v. *King & Spalding*, 467 U. S. 69, 73 (1984); *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957). This procedure, operating on the assumption that the factual allegations in the complaint are true, stream-lines litigation by dispensing with needless discovery and factfinding. Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," *Hishon, supra,* at 73, a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one. What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations. District court judges looking to dismiss claims on such grounds must look elsewhere for legal support.[6]

Section 1915(d) has a separate function, one which molds rather differently the power to dismiss which it confers. Section 1915(d) is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11. To this end, the statute accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless. Examples of the former class are claims against which it is clear that the defendants are immune from suit, see, *e. g., Williams* v. *Goldsmith,* 701 F. 2d 603 (CA7 1983), and claims of infringement of a legal interest which clearly does not exist, like respondent Williams' claim that his transfer within the reformatory violated his rights under the Due

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[6] A patently insubstantial complaint may be dismissed, for example, for want of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). See, *e. g., Hagans* v. *Lavine,* 415 U. S. 528, 536–537 (1974) (federal courts lack power to entertain claims that are " 'so attenuated and unsubstantial as to be absolutely devoid of merit' ") (citation omitted); *Bell* v. *Hood,* 327 U. S. 678, 682–683 (1946).

Process Clause. Examples of the latter class are claims describing fantastic or delusional scenarios, claims with which federal district judges are all too familiar.

To the extent that a complaint filed *in forma pauperis* which fails to state a claim lacks even an arguable basis in law, Rule 12(b)(6) and § 1915(d) both counsel dismissal.[7] But the considerable common ground between these standards does not mean that the one invariably encompasses the other. When a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal on Rule 12(b)(6) grounds is appropriate, but dismissal on the basis of frivolousness is not. This conclusion follows naturally from § 1915(d)'s role of replicating the function of screening out inarguable claims which is played in the realm of paid cases by financial considerations. The cost of bringing suit and the fear of financial sanctions doubtless deter most inarguable paid claims, but such deterrence presumably screens out far less frequently those arguably meritorious legal theories whose ultimate failure is not apparent at the outset.

Close questions of federal law, including claims filed pursuant to 42 U. S. C. § 1983, have on a number of occasions arisen on motions to dismiss for failure to state a claim, and have been substantial enough to warrant this Court's granting review, under its certiorari jurisdiction, to resolve them. See, *e. g.*, *Estelle* v. *Gamble*, 429 U. S. 97 (1976); *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U. S. 273 (1976); *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971); *Jones* v. *Alfred Mayer Co.*, 392 U. S. 409 (1968). It can hardly be said that the substantial legal claims raised in these cases were so defective that they should never have been brought at the outset. To term these claims frivolous is to distort measurably the meaning of frivolousness both in common and legal parlance. Indeed, we recently reviewed the dismissal under Rule 12(b)(6) of a complaint based on 42 U. S. C. § 1983 and found by a 9-to-0 vote that it had, in fact, stated a cognizable claim—a powerful illustration that a finding of a failure to state a claim does not invariably mean that the claim is without arguable merit. See *Brower* v. *County of Inyo*, 489 U. S. 593 (1989). That frivolousness in the § 1915(d) context refers to a more limited set of claims than does Rule 12(b)(6) accords, moreover, with the understanding articulated in other areas of law that not all unsuccessful claims are frivolous. See, *e. g., Penson* v. *Ohio*, 488 U. S. 75 (1988) (criminal defendant has right to appellate counsel even if his claims are ultimately unavailing so long as they are not frivolous); *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 422 (1978) (attorney's fees may not be assessed against a plaintiff who fails to state a claim under 42 U. S. C. § 1988 or under Title VII of the Civil Rights Act of 1964 unless his complaint is frivolous); *Hagans* v. *Lavine*, 415 U. S. 528, 536–537 (1974) (complaint that fails to state a claim may not be dismissed for want of subject-matter jurisdiction unless it is frivolous).

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[7] At argument, Williams' counsel estimated that many, if not most, prisoner complaints which fail to state a claim also fall afoul of § 1915's strictures, Tr. of Oral Arg. 27, an estimate with which our experience does not incline us to take issue.

Our conclusion today is consonant with Congress' overarching goal in enacting the *in forma pauperis* statute: "to assure equality of consideration for all litigants." *Coppedge* v. *United States*, 369 U. S. 438, 447 (1962); see also H. R. Rep. No. 1079, 52d Cong., 1st Sess., 1 (1892). Under Rule 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon.[8] These procedures alert him to the legal theory underlying the defendant's challenge, and enable him meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform with the requirements of a valid legal cause of action. This adversarial process also crystallizes the pertinent issues and facilitates appellate review of a trial court dismissal by creating a more complete record of the case. *Brandon* v. *District of Columbia Board of Parole*, 236 U. S. App. D. C. 155, 158, 734 F. 2d 56, 59 (1984), cert. denied, 469 U. S. 1127 (1985). By contrast, the *sua sponte* dismissals permitted by, and frequently employed under, § 1915(d), necessary though they may sometimes be to shield defendants from vexatious lawsuits, involve no such procedural protections.

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[8] We have no occasion to pass judgment, however, on the permissible scope, if any, of *sua sponte* dismissals under Rule 12(b)(6).

To conflate the standards of frivolousness and failure to state a claim, as petitioners urge, would thus deny indigent plaintiffs the practical protections against unwarranted dismissal generally accorded paying plaintiffs under the Federal Rules. A complaint like that filed by Williams under the Eighth Amendment, whose only defect was its failure to state a claim, will in all likelihood be dismissed *sua sponte*, whereas an identical complaint filed by a paying plaintiff will in all likelihood receive the considerable benefits of the adversary proceedings contemplated by the Federal Rules. Given Congress' goal of putting indigent plaintiffs on a similar footing with paying plaintiffs, petitioners' interpretation cannot reasonably be sustained. According opportunities for responsive pleadings to indigent litigants commensurate to the opportunities accorded similarly situated paying plaintiffs is all the more important because indigent plaintiffs so often proceed *pro se* and therefore may be less capable of formulating legally competent initial pleadings. See *Haines* v. *Kerner*, 404 U. S. 519, 520 (1972).[9]

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[9] Petitioners' related suggestion that, as a practical matter, the liberal pleading standard applied to *pro se* plaintiffs under *Haines* provides ample protection misses the mark for two reasons. First, it is possible for a plaintiff to file *in forma pauperis* while represented by counsel. See, *e. g.*, *Adkins* v. *E. I. DuPont de Nemours & Co.*, 335 U. S. 331 (1948). Second, the liberal pleading standard of *Haines* applies only to a plaintiff's

We therefore hold that a complaint filed *in forma pauperis* is not automatically frivolous within the meaning of § 1915(d) because it fails to state a claim. The judgment of the Court of Appeals is accordingly

Affirmed.

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factual allegations. Responsive pleadings thus may be necessary for a *pro se* plaintiff to clarify his legal theories.

ROBERTSON, CHIEF OF THE FOREST SERVICE, ET AL. *v.* METHOW VALLEY CITIZENS COUNCIL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-1703. Argued January 9, 1989—Decided May 1, 1989

The Forest Service is authorized by statute to manage national forests for, *inter alia*, recreational purposes. Because its decision to issue a recreational special use permit is a "major Federal action" within the meaning of the National Environmental Policy Act of 1969 (NEPA), that decision must be preceded by the preparation of an Environmental Impact Statement (EIS). After a Service study designated a particular national forest location as having a high potential for development as a major downhill ski resort, Methow Recreation, Inc. (MRI), applied for a special use permit to develop and operate such a resort on that site and on adjacent private land MRI had acquired. In cooperation with state and local officials, the Service prepared an EIS (the Study), which, among other things, considered the effects of various levels of development on wildlife and air quality both on-site and—as required by Council on Environmental Quality (CEQ) regulations—off-site, and outlined steps that might be taken to mitigate adverse effects, indicating that these proposed steps were merely conceptual and would "be made more specific as part of the design and implementation stages of the planning process." The Study's proposed options regarding off-site mitigation measures were primarily directed to steps that might be taken by state and local governments. After the Regional Forester decided to issue a permit as recommended by the Study, respondents appealed to the Chief of the Forest Service, who affirmed. Respondents then brought suit to review the Service's decision, claiming that the Study did not satisfy NEPA's requirements. The District Court's Magistrate filed an opinion concluding that the Study was adequate, but the Court of Appeals reversed, concluding that the Study was inadequate as a matter of law on the grounds, *inter alia*, that NEPA imposes a substantive duty on agencies to take action to mitigate the adverse effects of major federal actions, which entails the further duty to include in every EIS a detailed explanation of specific actions that *will* be employed to mitigate the adverse impact; that if the Service had difficulty obtaining adequate information to make a reasoned assessment of the project's environmental impact, it had an obligation to make a "worst case analysis" on the basis of available information, using reasonable projections of the worst possible consequences; and that the Service's failure to develop a complete mitigation plan violated its own regulations.

Held:

1. NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or to include in each EIS a fully developed mitigation plan. Although the EIS requirement and NEPA's other "action-forcing" procedures implement that statute's sweeping policy goals by ensuring that agencies will take a "hard look" at environmental consequences and by guaranteeing broad public dissemination of relevant information, it is well settled that NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed—rather than unwise—agency action. While a reasonably complete discussion of possible mitigation measures is an important ingredient of an EIS, and its omission therefrom would undermine NEPA's "action-forcing" function, there is a fundamental distinction between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated and a substantive requirement that a complete mitigation plan be actually formulated and adopted. Here, since the off-site environmental effects of the project cannot be mitigated unless the nonfederal government agencies having jurisdiction over the off-site area take appropriate action, it would be incongruous to conclude that the Service has no power to act until the local agencies have finally determined what mitigation measures are necessary. More significantly, it would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed mitigation plan before the agency can act. Pp. 348–353.

2. NEPA does not impose a duty on an agency to make a "worst case analysis" in its EIS if it cannot make a reasoned assessment of a proposed project's environmental impact. Although prior CEQ regulations requiring such an analysis may well have expressed a permissible interpretation of NEPA, those regulations have since been amended to replace the worst case requirement with new requirements, and the Act itself does not mandate that uncertainty in predicting environmental harms be addressed exclusively by a worst case analysis. The Court of Appeals erred in concluding that the worst case regulation was a codification of prior NEPA case law, which, in fact, merely required agencies to describe environmental impacts even in the face of substantial uncertainty. Moreover, the new CEQ regulations—which require that agencies, in the face of unavailable information concerning a reasonably fore-

seeable significant environmental consequence, prepare a summary of existing relevant and credible scientific evidence and an evaluation of adverse impacts based on generally accepted scientific approaches or research methods—is entitled to substantial deference even though the worst case rule was in some respects more demanding, since there was good reason for the change in light of the substantial criticism to which the old regulation was subjected, and since the amendment was designed to better serve the EIS' "hard look" and public disclosure functions in preference to distorting the decisionmaking process by overemphasizing highly speculative harms. Pp. 354–356.

3. The Court of Appeals erred in concluding that the Service's failure to develop a complete mitigation plan violated its own regulations, which require, *inter alia*, that "[e]ach special use authorization . . . contain . . . [t]erms and conditions which will . . . minimize damage to . . . the environment." Since the Study made clear that on-site effects of the proposed development will be minimal and easily mitigated, its recommended ameliorative steps cannot be deemed overly vague or underdeveloped. Moreover, although NEPA and CEQ regulations require detailed analysis of off-site mitigation measures, there is no basis to conclude that the Service's own regulations must also be read in all cases to condition permit issuance on consideration (and implementation) of such measures. The Service's regulations were promulgated pursuant to its broad statutory authorization to allow recreational use of national forests and were not based on NEPA's more direct concern for environmental quality. As is clear from the text of the permit issued to MRI, the Service has decided to implement its mitigation regulations by imposing appropriate controls over MRI's actual development and operation during the permit's term. It was not unreasonable for the Service to have construed those regulations as not extending to off-site mitigation efforts that might be taken by state and local authorities, and that interpretation is controlling. Pp. 357–359.

833 F. 2d 810, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring statement, *post*, p. 359.

Solicitor General Fried argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Marzulla, Deputy Solicitor General Wallace, Jeffrey P. Minear, Peter R. Steenland, Jr.*, and *Vicki L. Plaut.*

David A. Bricklin argued the cause for respondents. With him on the brief for respondent Methow Valley Citizens Council was *Michael W. Gendler*. *Glenn J. Amster* filed a brief for respondent Methow Recreation, Inc.*

JUSTICE STEVENS delivered the opinion of the Court.

We granted certiorari to decide two questions of law.[1] As framed by petitioners, they are:

> "1. Whether the National Environmental Policy Act requires federal agencies to include in each environmental impact statement: (a) a fully developed plan to miti-

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*Briefs of *amici curiae* urging reversal were filed for the Institute of Law and Public Health Protection by *Steven R. Perles* and *Scott C. Whitney;* and for the Northwest Forest Resource Council et al. by *Mark C. Rutzick* and *Douglas C. Blomgren.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *N. Gregory Taylor* and *Theodora Berger*, Assistant Attorneys General, and *Clifford L. Rechtschaffen* and *Mary Gray Holt*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Don Siegelman* of Alabama, *Grace Berg Schaible* of Alaska, *Duane Woodard* of Colorado, *Jim Jones* of Idaho, *Neil F. Hartigan* of Illinois, *Thomas J. Miller* of Iowa, *Robert T. Stephan* of Kansas, *Frederick J. Cowan* of Kentucky, *James E. Tierney* of Maine, *James J. Shannon* of Massachusetts, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *William L. Webster* of Missouri, *Mike Greely* of Montana, *Robert M. Spire* of Nebraska, *Stephen E. Merrill* of New Hampshire, *Cary Edwards* of New Jersey, *Robert Abrams* of New York, *Brian McKay* of Nevada, *Lacy H. Thornburg* of North Carolina, *Robert H. Henry* of Oklahoma, *LeRoy S. Zimmerman* of Pennsylvania, *T. Travis Medlock* of South Carolina, *Charles W. Burson* of Tennessee, *Jim Mattox* of Texas, *Jeffrey Amestoy* of Vermont, *Mary Sue Terry* of Virginia, and *Charles G. Brown* of West Virginia; for the American Planning Association by *Stephen C. Kelly;* for the International Association of Fish and Wildlife Agencies by *Paul A. Lenzini;* and for the National Wildlife Federation et al. by *Victor M. Sher*, *Todd D. True*, and *Tom Lustig*.

Briefs of *amici curiae* were filed for the Center for Enviromental Education by *Nicholas C. Yost* and *William A. Butler;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Robin L. Rivett*.

[1] In the order granting certiorari, we consolidated this case with *Marsh* v. *Oregon Natural Resources Council*, No. 87–1704. See 487 U. S. 1217 (1988). Our decision in *Marsh* appears *post*, p. 360.

> gate environmental harm; and (b) a 'worst case' analysis of potential environmental harm if relevant information concerning significant environmental effects is unavailable or too costly to obtain.
>
> "2. Whether the Forest Service may issue a special use permit for recreational use of national forest land in the absence of a fully developed plan to mitigate environmental harm." Pet. for Cert. i.

Concluding that the Court of Appeals for the Ninth Circuit misapplied the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. §4321 *et seq.*, and gave inadequate deference to the Forest Service's interpretation of its own regulations, we reverse and remand for further proceedings.

I

The Forest Service is authorized by statute to manage the national forests for "outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 74 Stat. 215, 16 U. S. C. §528. See also 90 Stat. 2949, 16 U. S. C. §1600 *et seq*. Pursuant to that authorization, the Forest Service has issued "special use" permits for the operation of approximately 170 Alpine and Nordic ski areas on federal lands. See H. R. Rep. No. 99–709, pt. 1, p. 2 (1986).

The Forest Service permit process involves three separate stages. The Forest Service first examines the general environmental and financial feasibility of a proposed project and decides whether to issue a special use permit. See 36 CFR §251.54(f) (1988). Because that decision is a "major Federal action" within the meaning of NEPA, it must be preceded by the preparation of an Environmental Impact Statement (EIS). 42 U. S. C. §4332. If the Service decides to issue a permit, it then proceeds to select a developer, formulate the basic terms of the arrangement with the selected party, and issue the permit.[2] The special use permit does not, however, give the developer the right to begin construction. See 36 CFR § 251.56(c) (1988). In a final stage of review, the Service evaluates the permittee's "master plan" for development, construction, and operation of the project. Construction may begin only after an additional environmental analysis (although it is not clear that a second EIS need always be prepared) and final approval of the developer's master plan. This case arises out of the Forest Service's decision to issue a special use permit authorizing the development of a major destination Alpine ski resort at Sandy Butte in the North Cascade Mountains.

Sandy Butte is a 6,000-foot mountain located in the Okanogan National Forest in Okanogan County, Washington. At present Sandy Butte, like the Methow Valley it overlooks, is an unspoiled, sparsely populated area that the District Court characterized as "pristine." App. to Pet. for Cert. 20a. In 1968, Congress established the North Cascades National Park and directed the Secretaries of the Interior and Agriculture to agree on the designation of areas within, and adjacent to, the park for public uses, including ski areas. 82 Stat. 926, 930, 16 U. S. C. §§ 90, 90d–3. A 1970 study conducted by the Forest Service pursuant to this congressional directive identified Sandy Butte as having the highest potential of any site in the State of Washington for development as a major downhill ski resort.[3] App. to Pet. for Cert. 23a.

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[2] The developer is chosen based on: (1) "[k]ind and quality of services to be offered"; (2) "[f]inancial capability"; (3) "[e]xperience and qualifications in relation to the proposed use"; (4) "[a]bility to perform according to permit terms including Federal, State, and local laws"; and (5) "[c]ontrol of private lands necessary to develop the proposed use." U. S. Dept. of Agriculture, Forest Service, Final EIS, Early Winters Alpine Winter Sports Study 4 (1984).

[3] The 1970 report was entitled the North Cascades Winter Sports Study. Its conclusion that Sandy Butte is well suited for development as an Alpine

In 1978, Methow Recreation, Inc. (MRI), applied for a special use permit to develop and operate its proposed "Early Winters Ski Resort" on Sandy Butte and an 1,165-acre parcel of land it had acquired adjacent to the National Forest. The proposed development would make use of approximately 3,900 acres of Sandy Butte; would entice visitors to travel long distances to stay at the resort for several days at a time; and would stimulate extensive commercial and residential growth in the vicinity to accommodate both vacationers and staff.

In response to MRI's application, the Forest Service, in cooperation with state and county officials, prepared an EIS known as the Early Winters Alpine Winter Sports Study (Early Winters Study or Study). The stated purpose of the EIS was "to provide the information required to evaluate the potential for skiing at Early Winters" and "to assist in making a decision whether to issue a Special Use Permit for downhill skiing on all or a portion of approximately 3900 acres of National Forest System land." Early Winters Study 1. A draft of the Study was completed and circulated in 1982, but release of the final EIS was delayed as Congress considered including Sandy Butte in a proposed wilderness area. App. to Pet. for Cert. 26a. When the Washington State Wilderness Act of 1984 was passed, however, Sandy Butte was excluded from the wilderness designation,[4] and the EIS was released.

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ski resort was repeated in the Joint Plan for the North Cascades area, which was issued by the Park Service and the Forest Service in 1974. See App. to Pet. for Cert. 23a.

[4] See 98 Stat. 299. In the Senate Committee Report explaining the decision to exclude Sandy Butte from the wilderness designation in the bill, the Committee made this quite remarkable comment for a legislative committee: "The Forest Service and the Department of Agriculture are directed to allow the evaluation process for the Sandy Butte development to proceed without additional delay . . . ." S. Rep. No. 98-461, p. 11 (1984).

The Early Winters Study is a printed document containing almost 150 pages of text and 12 appendices. It evaluated five alternative levels of development of Sandy Butte that might be authorized, the lowest being a "no action" alternative and the highest being development of a 16-lift ski area able to accommodate 10,500 skiers at one time. The Study considered the effect of each level of development on water resources, soil, wildlife, air quality, vegetation, and visual quality, as well as land use and transportation in the Methow Valley, probable demographic shifts, the economic market for skiing and other summer and winter recreational activities in the Valley, and the energy requirements for the ski area and related developments. The Study's discussion of possible impacts was not limited to on-site effects, but also, as required by Council on Environmental Quality (CEQ) regulations, see 40 CFR § 1502.16(b) (1987), addressed "off-site impacts that each alternative might have on community facilities, socio-economic and other environmental conditions in the Upper Methow Valley." Early Winters Study 1. As to off-site effects, the Study explained that "due to the uncertainty of where other public and private lands may become developed," it is difficult to evaluate off-site impacts, *id.*, at 76, and thus the document's analysis is necessarily "not site-specific," *id.*, at 1. Finally, the Study outlined certain steps that might be taken to mitigate adverse effects, both on Sandy Butte and in the neighboring Methow Valley, but indicated that these proposed steps are merely conceptual and "will be made more specific as part of the design and implementation stages of the planning process." *Id.*, at 14.

The effects of the proposed development on air quality and wildlife received particular attention in the Study. In the chapter on "Environmental Consequences," the first subject discussed is air quality. As is true of other subjects, the discussion included an analysis of cumulative impacts over several years resulting from actions on other lands as well as from the development of Sandy Butte itself. The Study concluded that although the construction, maintenance, and operation of the proposed ski area "will not have a measurable effect on existing or future air quality," the off-site development of private land under all five alternatives—including the "no action" alternative—"will have a significant effect on air quality during severe meteorological inversion periods." *Id.*, at 65. The burning of wood for space heat, the Study explained, would constitute the primary cause of diminished air quality, and the damage would increase incrementally with each of the successive levels of proposed development. *Ibid.* The Study cautioned that without efforts to mitigate these effects, even under the "no action" alternative, the increase in automobile, fireplace, and wood stove use would reduce air quality below state standards, but added that "[t]he numerous mitigation measures discussed" in the Study "will greatly reduce the impacts presented by the model." *Id.*, at 67.

In its discussion of air-quality mitigation measures, the EIS identified actions that could be taken by the county government to mitigate the adverse effects of development, as well as those that the Forest Service itself could implement at the construction stage of the project. The Study suggested that Okanogan County develop an air quality management plan, requiring weatherization of new buildings, limiting the number of wood stoves and fireplaces, and adopting monitoring and enforcement measures.[5] In addition, the

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[5] The Study recommended the following action:

"1. The County will initiate the formation of an Air Quality Control Authority or similar administrative structure pursuant to Washington State statutes.

"2. The County will develop an airshed management plan that incorporates strategies which will result in ambient air quality standards for the Methow Valley that are stricter than existing State standards. As part of

Study suggested that the Forest Service require that the master plan include procedures to control dust and to comply with smoke management practices.[6]

In its discussion of adverse effects on area wildlife, the EIS concluded that no endangered or threatened species would be affected by the proposed development and that the only impact on sensitive species was the probable loss of a pair of spotted owls and their progeny. *Id.*, at 75. With regard to other wildlife, the Study considered the impact on 75 differ-

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the airshed management plan, the following mitigation measures will be considered:

"—Development of land use codes specifically addressing site development and project design directed at energy efficiency and air pollution control.

"—Requiring all new construction to be fully weatherized to reduce the need for supplemental heating sources (i. e., wood) beyond the central facilities heating needs.

"—Restricting the number of fireplaces and wood stoves. At a minimum, few fireplaces should be allowed in accommodations constructed for tourist use.

"—Encouraging the use of alternative, non-polluting energy sources.

"—Establishing a certification mechanism for wood stoves and fireplace inserts.

"—Establishing an air pollution monitoring system specifically designed to alert local residents to impending pollution episodes and to record long term changes in air quality levels. Such long term data will be used to evaluate the success or failure of the mitigation and impose more stringent measures if standards are violated.

"—Development of enforcement measures to assure that standards will be met." Early Winters Study 68–69.

[6] The Study recommended the following on-site, air-quality mitigation measures:

"1. The Master Plan will require prompt revegetation of all disturbed areas and the mandatory application of dust control measures (e. g., rocking and oiling) on unpaved construction roads.

"2. The construction phase will follow established Forest Service/State of Washington smoke management practices identified in the Washington State Smoke Management Plan. The Master Plan will identify opportunities for utilization of waste wood, generated by the project, thereby minimizing open burning." *Id.*, at 69.

ent indigenous species and predicted that within a decade after development vegetational change and increased human activity would lead to a decrease in population for 31 species, while causing an increase in population for another 24 species on Sandy Butte. *Ibid.* Two species, the pine marten and nesting goshawk, would be eliminated altogether from the area of development. *Ibid.*

In a comment in response to the draft EIS, the Washington Department of Game voiced a special concern about potential losses to the State's largest migratory deer herd, which uses the Methow Valley as a critical winter range and as its migration route. *Id.*, at Appendix D (letter of November 18, 1982). The state agency estimated that the total population of mule deer in the area most likely to be affected was "better than 30,000 animals" and that "the ultimate impact on the Methow deer herd could exceed a 50 percent reduction in numbers." *Ibid.* The agency asserted that "Okanogan County residents place a great deal of importance on the area's deer herd." *Ibid.* In addition, it explained that hunters had "harvested" 3,247 deer in the Methow Valley area in 1981, and that, since in 1980 hunters on average spent $1,980 for each deer killed in Washington, they had contributed over $6 million to the State's economy in 1981. Because the deer harvest is apparently proportional to the size of the herd, the state agency predicted that "Washington business can expect to lose over $3 million annually from reduced recreational opportunity." *Ibid.* The Forest Service's own analysis of the impact on the deer herd was more modest. It first concluded that the actual operation of the ski hill would have only a "minor" direct impact on the herd,[7] but then recognized that the off-site effect of the development "would noticeably reduce numbers of deer in the Methow [Valley] with any alternative." *Id.*, at 76. Although its estimate indicated a possible 15 percent decrease in the size of the herd, it summarized the State's contrary view in the text of the EIS, and stressed that off-site effects are difficult to estimate due to uncertainty concerning private development. *Ibid.*

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[7] *Id.*, at 76. The Study predicted that development of the ski area would diminish available summer range for the deer by between 5 and 10 percent, depending on the level of development chosen. Moreover, it recognized that although disturbance would be greatest during fawning season, "[f]awning would not be adversely affected with implementation of mitigation measures." *Id.*, at 75–76.

As was true of its discussion of air quality, the EIS also described both on-site and off-site mitigation measures. Among possible on-site mitigation possibilities, the Study recommended locating runs, ski lifts, and roads so as to minimize interference with wildlife, restricting access to selected roads during fawning season, and further examination of the effect of the development on mule deer migration routes.[8] Off-site options discussed in the Study included the use of zoning and tax incentives to limit development on deer winter range and migration routes, encouragement of conservation easements, and acquisition and management by local government of critical tracts of land.[9] As with the measures suggested for mitigating the off-site effects on air quality, the proposed options were primarily directed to steps that might be taken by state and local government.

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[8] The EIS listed the following opportunities for on-site mitigation:

"a) Locate runs, lifts, roads, and other facilities to minimize disturbance of blue grouse wintering areas (primarily ridgetops).

"b) Leave dead and defective trees standing in timbered areas where skier safety can be protected.

"c) Restrict activities and travel on selected roads during the fawning season (June).

"d) Locate new service roads away from water sources and fawning cover.

"e) Evaluate impact to mule deer migration routes in review of Master Plan.

"f) Design and harvest nearby, off-site timber sales to retain adequate travel corridors, foraging, roosting, and nesting sites for spotted owls.

"g) Protect other likely migration routes between summer and winter habitats for spotted owls.

"h) Restrict other activities within the spotted owls home range.

"i) Springs and riparian areas in the permit area will be protected as water sources and wildlife habitat. . . ." *Id.*, at 16–17.

The Study further noted that additional mitigation opportunities might result from review of the master plan. *Id.*, at 77.

Ultimately, the Early Winters Study recommended the issuance of a permit for development at the second highest level considered—a 16-lift ski area able to accommodate 8,200 skiers at one time. On July 5, 1984, the Regional Forester decided to issue a special use permit as recommended by the

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[9] The Study listed the following steps that state and local government might take to mitigate off-site effects:

"[1] Limit development on deer winter range and along migration routes through rezoning options, tax incentives and other means.

"Since loss of winter range and disruption of migration routes are primarily concerns which will cause declines in deer numbers, protection of vital portions will be assured prior to a ski hill development. Rezoning is essential and will occur, to include County rezoning options such as:

"(a) The Methow Review District which is currently applied to obtain certain densities, open space, and design.

"(b) Other optional zone districts such as Conservation Districts which are available for amending existing zoning and protecting environmentally sensitive lands.

"Other measures are probably needed, and which could occur, include:

"(c) Conservation Easements between private individuals and trust agencies (e. g., Washington Department of Game) should be encouraged. Benefits would occur to both the landowner in the form of tax breaks, and the wildlife resource in the form of undeveloped, status quo habitat.

"(d) Acquisition of certain land tracts essential to migrating deer may be needed to insure continued passage. These lands would be administered by a wildlife management agency (e. g., Washington Department of Game).

"[2] Minimize potential road kills of deer and other wildlife by use of warning signs, speed limits, and roadway design where wildlife crossings and high speed driving occur. Responsibility rests with the appropriate agency's road department (i. e., County, State, Federal) in the Methow Valley.

"[3] Protect wildlife from free-ranging dogs through County ordinances that are enforceable.

"[4] Through zoning, discourage development in riparian areas." *Id.*, at 77–78.

Study.[10] App. to Pet. for Cert. 63a. In his decision, the Regional Forester found that no major adverse effects would result directly from the federal action, but that secondary effects could include a degradation of existing air quality and a reduction of mule deer winter range. *Id.*, at 67a. He therefore directed the supervisor of the Okanogan National Forest, both independently and in cooperation with local officials, to identify and implement certain mitigating measures. *Id.*, at 67a–70a.

Four organizations (respondents)[11] opposing the decision to issue a permit appealed the Regional Forester's decision to the Chief of the Forest Service. See 36 CFR § 211.18 (1988). After a hearing, he affirmed the Regional Forester's decision. Stressing that the decision, which simply approved the general concept of issuing a 30-year special use permit for development of Sandy Butte, did not authorize construction of a particular ski area and, in fact, did not even act on MRI's specific permit application, he concluded that the EIS' discussion of mitigation was "adequate for this stage in the review process." App. to Pet. for Cert. 59a.

Thereafter, respondents brought this action under the Administrative Procedure Act, 5 U. S. C. §§ 701–706, to obtain judicial review of the Forest Service's decision. Their principal claim was that the Early Winters Study did not satisfy the requirements of NEPA, 42 U. S. C. § 4332.[12] With the consent of the parties, the case was assigned to a United States Magistrate. See 28 U. S. C. § 636(c). After a trial, the Magistrate filed a comprehensive written opinion and concluded that the EIS was adequate. App. to Pet. for Cert. 20a. Specifically, he found that the EIS had adequately disclosed the adverse impacts on the mule deer herd and on air quality and that there was no duty to prepare a "worst case analysis" because the relevant information essential to a reasoned decision was available. *Id.*, at 39a–44a. In concluding that the discussion of off-site, or secondary, impacts was adequate, the Magistrate stressed that courts apply a "rule of reason" in evaluating the adequacy of an EIS and "take the uncertainty and speculation involved with secondary impacts into account in passing on the adequacy of the discussion of secondary impacts." *Id.*, at 38a. On the subject of mitigation, he explained that "[m]ere listing . . . is generally inadequate to satisfy the CEQ regulations," but found that "in this EIS there is more—not much more—but more than a mere listing of mitigation measures." *Id.*, at 41a. Moreover, emphasizing the tiered nature of the Forest Service's decisional process, the Magistrate noted that additional mitigation strategies would be included in the master plan, that the Forest Service continues to develop mitigation plans as further information becomes available, and that the Regional Forester's decision conditioned issuance of the special use permit on execution of an agreement between the Forest Service, the State of Washington, and Okanogan County concerning mitigation. *Id.*, at 41a–42a, 45a.

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[10] His decision did not identify a particular developer, but rather simply authorized the taking of competitive bids. App. to Pet. for Cert. 63a. It was not until July 21, 1986, almost one month after the District Court affirmed the Forester's decision, that a special use permit was issued to MRI.

[11] The four organizations were Methow Valley Citizens Council, Washington State Sportsmen's Council, Washington Environmental Council, and the Cascade Chapter, Sierra Club. These organizations, with the exception of Washington State Sportsmen's Council, are respondents herein. MRI, the permittee, is also a respondent in this Court, but since it supports the Government's action, we shall use the term "respondents" to refer only to the opponents of the Early Winters proposal.

Concluding that the Early Winters Study was inadequate as a matter of law, the Court of Appeals reversed. *Methow Valley Citizens Council* v. *Regional Forester*, 833 F. 2d 810

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[12] Respondents also alleged violations of the National Forest Management Act of 1976, 16 U. S. C. §§ 1600–1614, and the Clean Air Act, 42 U. S. C. §§ 7401–7626. These claims were dismissed on petitioners' motion for summary judgment and are no longer in issue. App. to Pet. for Cert. 22a.

(CA9 1987). The court held that the Forest Service could not rely on "'the implementation of mitigation measures'" to support its conclusion that the impact on the mule deer would be minor, "since not only has the effectiveness of these mitigation measures not yet been assessed, but the mitigation measures themselves have yet to be developed." *Id.*, at 817. It then added that if the agency had difficulty obtaining adequate information to make a reasoned assessment of the environmental impact on the herd, it had a duty to make a so-called "worst case analysis." Such an analysis is "'formulated on the basis of available information, using reasonable projections of the worst possible consequences of a proposed action.' *Save our Ecosystems*, 747 F. 2d, at 1244–45 (quoting 46 Fed. Reg. 18032 (1981))." *Ibid.*

The court found a similar defect in the EIS' treatment of air quality. Since the EIS made it clear that commercial development in the Methow Valley will result in violations of state air-quality standards unless effective mitigation measures are put in place by the local governments and the private developer, the Court of Appeals concluded that the Forest Service had an affirmative duty to "develop the necessary mitigation measures *before* the permit is granted." *Id.*, at 819 (emphasis in original) (footnote omitted). The court held that this duty was imposed by both the Forest Service's own regulations and § 102 of NEPA. *Ibid.* It read the statute as imposing a substantive requirement that "'action be taken to mitigate the adverse effects of major federal actions.'" *Ibid.* (quoting *Stop H-3 Assn.* v. *Brinegar*, 389 F. Supp. 1102, 1111 (Haw. 1974), rev'd on other grounds, 533 F. 2d 434 (CA9), cert. denied, 429 U. S. 999 (1976)). For this reason, it concluded that "an EIS must include a thorough discussion of measures to mitigate the adverse environmental impacts of a proposed action." 833 F. 2d, at 819. The Court of Appeals concluded by quoting this paragraph from an opinion it had just announced:

> "'The importance of the mitigation plan cannot be overestimated. It is a determinative factor in evaluat-

ing the adequacy of an environmental impact statement. Without a complete mitigation plan, the decisionmaker is unable to make an informed judgment as to the environmental impact of the project—one of the main purposes of an environmental impact statement.'" *Id.*, at 820 (quoting *Oregon Natural Resources Council* v. *Marsh*, 832 F. 2d 1489, 1493 (CA9 1987), rev'd, *post*, p. 360).

II

Section 101 of NEPA declares a broad national commitment to protecting and promoting environmental quality. 83 Stat. 852, 42 U. S. C. § 4331. To ensure that this commitment is "infused into the ongoing programs and actions of the Federal Government, the act also establishes some important 'action-forcing' procedures." 115 Cong. Rec. 40416 (remarks of Sen. Jackson). See also S. Rep. No. 91–296, p. 19 (1969); *Andrus* v. *Sierra Club*, 442 U. S. 347, 350 (1979); *Kleppe* v. *Sierra Club*, 427 U. S. 390, 409, and n. 18 (1976). Section 102 thus, among other measures

> "directs that, to the fullest extent possible . . . all agencies of the Federal Government shall—
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> . . . . .
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> "(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
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> "(i) the environmental impact of the proposed action,
>
> "(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> "(iii) alternatives to the proposed action,
>
> "(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> "(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed

action should it be implemented." 83 Stat. 853, 42 U. S. C. § 4332.

The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA's "action-forcing" purpose in two important respects. See *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U. S. 87, 97 (1983); *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project*, 454 U. S. 139, 143 (1981). It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast. See *ibid.*; *Kleppe*, *supra*, at 409. Moreover, the strong precatory language of § 101 of the Act and the requirement that agencies prepare detailed impact statements inevitably bring pressure to bear on agencies "to respond to the needs of environmental quality." 115 Cong. Rec. 40425 (1969) (remarks of Sen. Muskie).

Publication of an EIS, both in draft and final form, also serves a larger informational role. It gives the public the assurance that the agency "has indeed considered environmental concerns in its decisionmaking process," *Baltimore Gas & Electric Co.*, *supra*, at 97, and, perhaps more significantly, provides a springboard for public comment, see L. Caldwell, Science and the National Environmental Policy Act 72 (1982). Thus, in this case the final draft of the Early Winters Study reflects not only the work of the Forest Service itself, but also the critical views of the Washington State Department of Game, the Methow Valley Citizens Council, and

Friends of the Earth, as well as many others, to whom copies of the draft Study were circulated.[13] See Early Winters Study, Appendix D. Moreover, with respect to a development such as Sandy Butte, where the adverse effects on air quality and the mule deer herd are primarily attributable to predicted off-site development that will be subject to regulation by other governmental bodies, the EIS serves the function of offering those bodies adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner.

The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of "action-forcing" procedures that require that agencies take a "'hard look' at environmental consequences," *Kleppe*, 427 U. S., at 410, n. 21 (citation omitted), and that provide for broad dissemination of relevant environmental information. Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. See *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U. S. 223, 227–228 (1980) *(per curiam); Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 558 (1978). If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. See *ibid.; Strycker's Bay Neighborhood Council, Inc., supra*, at 227–228; *Kleppe, supra*, at 410, n. 21. In this case, for example, it would not have violated NEPA if the Forest Service, after complying with the Act's procedural prerequisites, had decided that the benefits to be derived from downhill skiing at Sandy Butte justified the issuance of a special use permit, notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd. Other statutes may impose substantive environmental obligations on federal agencies,[14] but NEPA merely prohibits uninformed—rather than unwise—agency action.

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[13] The CEQ regulations require that, after preparing a draft EIS, the agency request comments from other federal agencies, appropriate state and local agencies, affected Indian tribes, any relevant applicant, the public generally, and, in particular, interested or affected persons or organizations. 40 CFR § 1503.1 (1987). In preparing the final EIS, the agency must "discuss at appropriate points . . . any responsible opposing view which was not adequately discussed in the draft statement and [must] indicate the agency's response to the issue raised." § 1502.9. See also § 1503.4.

To be sure, one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences.[15] The requirement that an EIS contain a detailed discussion of possible mitigation measures flows both from the language of the Act and, more expressly, from CEQ's implementing regulations. Implicit in NEPA's demand that an agency prepare a detailed statement on "any adverse environmental effects which cannot be avoided should the proposal be implemented," 42 U. S. C.

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[14] See, *e. g.*, the Endangered Species Act of 1973, 87 Stat. 892, 16 U. S. C. § 1536(a)(2) (requiring that every federal agency "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species"); the Department of Transportation Act of 1966, 49 U. S. C. § 303 (Secretary of Transportation may approve "use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge . . . or land of an historic site . . . only if . . . there is no prudent and feasible alternative to using that land; and . . . the program or project includes all possible planning to minimize harm to the [area] resulting from the use").

[15] CEQ regulations define "mitigation" to include:

"(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

"(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

"(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

"(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

"(e) Compensating for the impact by replacing or providing substitute resources or environments." 40 CFR § 1508.20 (1987).

§ 4332(C)(ii), is an understanding that the EIS will discuss the extent to which adverse effects can be avoided. See D. Mandelker, NEPA Law and Litigation § 10:38 (1984). More generally, omission of a reasonably complete discussion of possible mitigation measures would undermine the "action-forcing" function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects. An adverse effect that can be fully remedied by, for example, an inconsequential public expenditure is certainly not as serious as a similar effect that can only be modestly ameliorated through the commitment of vast public and private resources. Recognizing the importance of such a discussion in guaranteeing that the agency has taken a "hard look" at the environmental consequences of proposed federal action, CEQ regulations require that the agency discuss possible mitigation measures in defining the scope of the EIS, 40 CFR § 1508.25(b) (1987), in discussing alternatives to the proposed action, § 1502.14(f), and consequences of that action, § 1502.16(h), and in explaining its ultimate decision, § 1505.2(c).

There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other. In this case, the off-site effects on air quality and on the mule deer herd cannot be mitigated unless nonfederal government agencies take appropriate action. Since it is those state and local governmental bodies that have jurisdiction over the area in which the adverse effects need be addressed and since they have the authority to mitigate them, it would be incongruous to conclude that the Forest Service has no power to act until the local agencies have reached a final conclusion on what mitigating measures they consider necessary.[16] Even more significantly, it would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act. Cf. *Baltimore Gas & Electric Co.*, 462 U. S., at 100 ("NEPA does not require agencies to adopt any particular internal decisionmaking structure").

We thus conclude that the Court of Appeals erred, first, in assuming that "NEPA requires that 'action be taken to mitigate the adverse effects of major federal actions,'" 833 F. 2d, at 819 (quoting *Stop H-3 Assn.* v. *Brinegar*, 389 F. Supp., at 1111), and, second, in finding that this substantive requirement entails the further duty to include in every EIS "a detailed explanation of specific measures which *will* be employed to mitigate the adverse impacts of a proposed action," 833 F. 2d, at 819 (emphasis supplied).

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[16] After the Early Winters Study was completed and distributed, the Forest Service, the Environmental Protection Agency, the State Department of Ecology, and Okanogan County entered into a memorandum of understanding (MOU) committing various parties to take certain actions in mitigation. App. to Pet. for Cert. 45a–46a. In concluding that this agreement did not satisfy the mitigation discussion requirement, the Court of Appeals wrote:

> "[T]he MOU offers no assurance whatsoever that the vague mitigation objectives it features—performance of almost all of which would be the responsibility of third parties to the permit process—would ever in fact be achieved or even that effective measures would ever be designed (let alone implemented), if the Early Winters development were to proceed. Cf. *Preservation Coalition* [v. *Pierce*, 667 F. 2d 851, 860 (CA9 1982)] ('Since many of the "mitigations" proposed by the agency were . . . potential actions to be taken by [third parties] reliance on them . . . was improper')." *Methow Valley Citizens Council* v. *Regional Forester*, 833 F. 2d 810, 819–820 (CA9 1987).

Because NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures.

III

The Court of Appeals also concluded that the Forest Service had an obligation to make a "worst case analysis" if it could not make a reasoned assessment of the impact of the Early Winters project on the mule deer herd. Such a "worst case analysis" was required at one time by CEQ regulations, but those regulations have since been amended. Moreover, although the prior regulations may well have expressed a permissible application of NEPA, the Act itself does not mandate that uncertainty in predicting environmental harms be addressed exclusively in this manner. Accordingly, we conclude that the Court of Appeals also erred in requiring the "worst case" study.

In 1977, President Carter directed that CEQ promulgate binding regulations implementing the procedural provisions of NEPA. Exec. Order No. 11991, 3 CFR 123 (1977 Comp.). Pursuant to this Presidential order, CEQ promulgated implementing regulations. Under § 1502.22 of these regulations—a provision which became known as the "worst case requirement"—CEQ provided that if certain information relevant to the agency's evaluation of the proposed action is either unavailable or too costly to obtain, the agency must include in the EIS a "worst case analysis and an indication of the probability or improbability of its occurrence." 40 CFR § 1502.22 (1985). In 1986, however, CEQ replaced the "worst case" requirement with a requirement that federal agencies, in the face of unavailable information concerning a reasonably foreseeable significant environmental consequence, prepare "a summary of existing credible scientific evidence which is relevant to evaluating the . . . adverse impacts" and prepare an "evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community." 40 CFR § 1502.22(b) (1987). The amended regulation thus "retains the duty to describe the consequences of a remote, but potentially severe impact, but grounds the duty in evaluation of scientific opinion rather than in the framework of a conjectural 'worst case analysis.'" 50 Fed. Reg. 32237 (1985).

The Court of Appeals recognized that the "worst case analysis" regulation has been superseded, yet held that "[t]his rescission . . . does not nullify the requirement . . . since the regulation was merely a codification of prior NEPA case law." 833 F. 2d, at 817, n. 11. This conclusion, however, is erroneous in a number of respects. Most notably, review of NEPA case law reveals that the regulation, in fact, was not a codification of prior judicial decisions. See Note, 86 Mich. L. Rev. 777, 798, 800–802, 813–814 (1988). The cases cited by the Court of Appeals ultimately rely on the Fifth Circuit's decision in *Sierra Club* v. *Sigler*, 695 F. 2d 957 (1983). *Sigler*, however, simply recognized that the "worst case analysis" regulation codified the "judicially created principl[e]" that an EIS must "consider the probabilities of the occurrence of any environmental effects it discusses." *Id.*, at 970–971. As CEQ recognized at the time it superseded the regulation, case law prior to the adoption of the "worst case analysis" provision did require agencies to describe environmental impacts even in the face of substantial uncertainty, but did not require that this obligation necessarily be met through the mechanism of a "worst case analysis." See 51 Fed. Reg. 15625 (1986). CEQ's abandonment of the "worst case analysis" provision, therefore, is not inconsistent with any previously established judicial interpretation of the statute.

Nor are we convinced that the new CEQ regulation is not controlling simply because it was preceded by a rule that was in some respects more demanding. In *Andrus* v. *Sierra Club*, 442 U. S., at 358, we held that CEQ regulations are entitled to substantial deference. In that case we recognized that although less deference may be in order in some cases in which the "'administrative guidelines'" conflict "'with earlier pronouncements of the agency,'" *ibid.* (quoting *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 143 (1976)), substantial deference is nonetheless appropriate if there appears to have been good reason for the change, 442 U. S., at 358. Here, the amendment only came after the prior regulation had been subjected to considerable criticism.[17] Moreover, the amendment was designed to better serve the twin functions of an EIS—requiring agencies to take a "hard look" at the consequences of the proposed action and providing important information to other groups and individuals. CEQ explained that by requiring that an EIS focus on reasonably foreseeable impacts, the new regulation "will generate information and discussion on those consequences of greatest concern to the public and of greatest relevance to the agency's decision," 50 Fed. Reg. 32237 (1985), rather than distorting the decisionmaking process by overemphasizing highly speculative harms, 51 Fed. Reg. 15624–15625 (1986); 50 Fed. Reg. 32236 (1985). In light of this well-considered basis for the change, the new regulation is entitled to substantial deference. Accordingly, the Court of Appeals erred in concluding that the Early Winters Study is inadequate because it failed to include a "worst case analysis."[18]

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[17] As CEQ explained:

"Many respondents to the Council's Advance Notice of Proposed Rulemaking pointed to the limitless nature of the inquiry established by this requirement; that is, one can always conjure up a worse 'worst case' by adding an additional variable to a hypothetical scenario. Experts in the field of risk analysis and perception stated that the 'worst case analysis' lacks defensible rationale or procedures, and that the current regulatory language stands 'without any discernible link to the disciplines that have devoted so much thought and effort toward developing rational ways to cope with problems of uncertainty. It is, therefore, not surprising that no one knows how to do a worst case analysis . . .', Slovic, P., February 1, 1985, Response to ANPRM.

"Moreover, in the institutional context of litigation over EIS(s) the 'worst case' rule has proved counterproductive, because it has led to agencies being required to devote substantial time and resources to preparation of analyses which are not considered useful to decisionmakers and divert the EIS process from its intended purpose." 50 Fed. Reg. 32236 (1985).

[18] *Amicus curiae* Center for Environmental Education argues that the Court of Appeals properly applied the "worst case analysis" provision because the new regulation only applies to "environmental impact statements

IV

The Court of Appeals also held that the Forest Service's failure to develop a complete mitigation plan violated the agency's own regulations. 833 F. 2d, at 814, n. 3, 819, and n. 14. Those regulations require that an application for a special use permit include "measures and plans for the protection and rehabilitation of the environment during construction, operation, maintenance, and termination of the project," 36 CFR § 251.54(e)(4) (1988), and that "[e]ach special use authorization . . . contain . . . [t]erms and conditions which will . . . minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment," § 251.56(a)(1)(ii). Applying those regulations, the Court of Appeals concluded that "[s]ince the mitigation 'plan' here at issue is so vague and undeveloped as to be wholly inadequate, . . . the Regional Forester's decision to grant the special use permit could be none other than arbitrary, capricious and an abuse of discretion." 833 F. 2d, at 814, n. 3. We disagree.

The Early Winters Study made clear that on-site effects of the development will be minimal and will be easily mitigated. For example, the Study reported that "[i]mpacts from construction, maintenance and operation of the proposed 'hill' development on National Forest land will not have a measurable effect on existing or future air quality," Early Winters Study 65, and that "[t]he effect development and operation of the ski hill would have on deer migration should be minor," *id.*, at 76. Given the limited on-site effects of the proposed

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for which a Notice of Intent (40 CFR § 1508.22) [was] published . . . on or after May 27, 1986." 40 CFR § 1502.22(c) (1987). The grandfather clause of the regulation, however, further specifies that agencies have the option of applying the old or new regulation to EIS's commenced prior to May 27, 1986, that are still "in progress" after that date. *Ibid.* Because the Court of Appeals ordered that the Forest Service revise the Early Winters Study, and because such a revision is necessary even though we hold today that the Court of Appeals erred in part, the Study remains "in progress" and thus the Forest Service is entitled to rely on the new regulation.

development, the recommended ameliorative steps—which, for example, called for "prompt revegetation of all disturbed areas," *id.*, at 69, and suggested locating "new service roads away from water resources and fawning cover," *id.*, at 16—cannot be deemed overly vague or underdeveloped.

The Court of Appeals' conclusion that the Early Winters Study's treatment of possible mitigation measures is inadequate apparently turns on the court's review of the proposed off-site measures. Although NEPA and CEQ regulations require detailed analysis of both on-site and off-site mitigation measures, see, *e. g.*, 40 CFR § 1502.16(b) (1987), there is no basis for concluding that the Forest Service's own regulations must also be read in all cases to condition issuance of a special use permit on consideration (and implementation) of off-site mitigation measures. The Forest Service regulations were promulgated pursuant to a broad grant of authority "to permit the use and occupancy of suitable areas of land within the national forests . . . for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety," 16 U. S. C. § 497, and were not based on the more direct congressional concern for environmental quality embodied in NEPA.[19] See H. R. Rep. No. 99-709, pt. 1, p. 2 (1986). As is clear from the text of the permit issued to MRI, the Forest Service has decided to implement its mitigation regulations by imposing appropriate controls over MRI's actual development and operation during the term of the permit.[20] It was surely not unreasonable for the Forest

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[19] In October 1986, after the Forest Service issued its special use permit to MRI, Congress substantially revised the process for authorizing use of lands within the National Forest system for Nordic and Alpine ski operations. See National Forest Ski Area Permit Act of 1986, 100 Stat. 3000, 16 U. S. C. § 497b (1982 ed., Supp. V). These new procedures are not in issue in this case.

[20] The special use permit provides, in part, that the permittee "shall submit plans to reasonably restore or protect all areas disturbed during con-

Service in this case to have construed those regulations as not extending to actions that might be taken by Okanogan County or the State of Washington to ameliorate the off-site effects of the Early Winters project on air quality and the mule deer herd. This interpretation of the agency's own regulation is not "plainly erroneous or inconsistent with the regulation," and is thus controlling. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945). See also *Lyng* v. *Payne*, 476 U. S. 926, 939 (1986); *Udall* v. *Tallman*, 380 U. S. 1, 16–17 (1965).

V

In sum, we conclude that NEPA does not require a fully developed plan detailing what steps *will* be taken to mitigate adverse environmental impacts and does not require a "worst case analysis." In addition, we hold that the Forest Service has adopted a permissible interpretation of its own regulations. The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, concurring.

I write separately to highlight the Court's observation that "one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences." *Ante*, at 351.

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struction," and that "[e]ach stage of construction will be considered complete only upon completion and acceptance of the successful seeding and planting in the vicinity of construction," Special Use Authorization 17 (July 21, 1986); that the permittee shall prevent soil erosion "by carrying out the provisions of the erosion control plan prepared by the holder and approved by the authorized officer," *id.*, at 19; that "[p]esticides may not be used to control undesirable woody and herbaceous vegetation, aquatic plants, insects, rodents, etc., without the prior written approval of the Forest Service," *ibid.;* and that "[o]pen fireplaces shall be equipped with spark screens," *id.*, at 20.

MARSH, SECRETARY OF THE ARMY, ET AL. *v.* OREGON NATURAL RESOURCES COUNCIL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87–1704. Argued January 9, 1989—Decided May 1, 1989

The Elk Creek Dam is part of a three-dam project designed to control the water supply in Oregon's Rogue River Basin. The Army Corps of Engineers (Corps) completed an Environmental Impact Statement (EIS) for the Elk Creek project in 1971, and, in 1980, released its final Environmental Impact Statement, Supplement No. 1 (FEISS). Since the Rogue River is a premier fishing ground, the FEISS paid special heed to water quality, fish production, and angling and predicted that the Elk Creek Dam would have no major effect on fish production, but that the effect of the Lost Creek and Elk Creek Dams on turbidity might, on occasion, impair fishing. After reviewing the FEISS, the Corps' Division Engineer decided to proceed with the project and, in 1985, Congress appropriated funds for construction of the dam, now one-third completed. Respondents, four Oregon nonprofit corporations, filed an action in the District Court to enjoin construction of the Elk Creek Dam, claiming that the Corps had violated the National Environmental Policy Act of 1969 (NEPA) by failing, among other things, to describe adequately the environmental consequences of the project; to include a "worst case analysis"; and to prepare a second supplemental EIS to review information in two documents developed after 1980. The first—the Cramer Memorandum—is an internal memorandum, prepared by two Oregon Department of Fish and Wildlife (ODFW) biologists based on a draft ODFW study on the effects of the Lost Creek Dam, suggesting that the Elk Creek Dam will adversely affect downstream fishing; and the second is a United States Soil Conservation Service (SCS) soil survey containing information that might be taken to indicate greater downstream turbidity than did the FEISS. The District Court denied relief on all claims and held, *inter alia*, that the Corps' decision not to prepare a second supplemental EIS to address the new information was reasonable. The Court of Appeals reversed, holding, among other things, that the FEISS was defective because it did not include a complete mitigation plan and "worst case analysis," and, with regard to the failure to prepare a supplemental EIS, that the ODFW and SCS documents brought to light significant new information that was probably accurate and that the Corps' experts failed to evaluate with sufficient care.

Held:

1. The Court of Appeals' conclusions that the FEISS was defective because it did not include a complete mitigation plan and a "worst case analysis" are erroneous for the reasons stated in *Robertson* v. *Methow Valley Citizens Council*, *ante*, p. 332. Pp. 369–370.

2. The Corps' decision that the FEISS need not be supplemented is not arbitrary and capricious and should not be set aside. Pp. 370–385.

(a) An agency must apply a "rule of reason" and prepare a supplemental EIS if there remains "major Federal actio[n]" to occur, and if the new information will affect the quality of the human environment in a significant manner or to a significant extent not already considered. Although not expressly addressed in NEPA, such a duty is supported by NEPA's approach to environmental protection and its manifest concern with preventing uninformed action as well as by Council on Environmental Quality and Corps regulations, both of which make plain that at times supplementation is required. Pp. 370–374.

(b) Court review of the Corps' decision is controlled by the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U. S. C. § 706(2)(a). Respondents' supposition that the determination that new information is "significant" is either a question of law or of ultimate fact and, thus, "deserves no deference" on review is incorrect since the resolution of this dispute involves primarily issues of fact concerning contentions that the new information is accurate and undermines the FEISS' conclusions, and that the Corps' review was incomplete, inconclusive, or inaccurate. Because analysis of the documents requires a high degree of technical expertise, this Court must defer to the informed discretion of the responsible agency. However, courts should not defer to an agency without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the new information. Pp. 375–378.

(c) The Corps conducted a reasoned evaluation of the relevant information in a formal Supplemental Information Report (SIR) and reached a decision that was not arbitrary and capricious. The Corps carefully scrutinized the Cramer Memorandum—which did not reflect the neutral stand of ODFW's official position—and, in disputing its accuracy and significance, hired two independent experts who found significant fault in the methodology and conclusions of the underlying draft ODFW study. Although the SIR did not expressly comment on the SCS survey, in light of in-depth studies conducted in 1974 and 1979, its conclusion that "turbidity effects are not expected to differ from those described in the 1980 EISS" provided a legitimate reason for not preparing a supplemental FEISS to discuss turbidity. Pp. 378–385.

832 F. 2d 1489, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

Solicitor General Fried argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Marzulla, Deputy Solicitor General Wallace, Jeffrey P. Minear, Peter R. Steenland, Jr.*, and *Vicki L. Plaut.*

David A. Bricklin argued the cause for respondents. On the brief were *Neil S. Kagan* and *Michael D. Axline.**

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*Briefs of *amici curiae* urging reversal were filed for the Institute of Law and Public Health Protection by *Steven R. Perles* and *Scott C. Whitney;* and for the Northwest Forest Resource Council et al. by *Mark C. Rutzick* and *Douglas C. Blomgren.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *N. Gregory Taylor* and *Theodora Berger*, Assistant Attorneys General, and *Clifford L. Rechtschaffen* and *Mary Gray Holt*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Don Siegelman* of Alabama, *Grace Berg Schaible* of Alaska, *Duane Woodard* of Colorado, *Jim Jones* of Idaho, *Neil F. Hartigan* of Illinois, *Thomas J. Miller* of Iowa, *Robert T. Stephan* of Kansas, *Frederick J. Cowan* of Kentucky, *James E. Tierney* of Maine, *James J. Shannon* of Massachusetts, *Mike Moore* of Mississippi, *William L. Webster* of Missouri, *Hubert H. Humphrey III* of Minnesota, *Mike Greely* of Montana, *Robert M. Spire* of Nebraska, *Brian McKay* of Nevada, *Stephen E. Merrill* of New Hampshire, *Cary Edwards* of New Jersey, *Robert Abrams* of New York, *Lacy H. Thornburg* of North Carolina, *Robert H. Henry* of Oklahoma, *LeRoy S. Zimmerman* of Pennsylvania, *T. Travis Medlock* of South Carolina, *Charles W. Burson* of Tennessee, *Jim Mattox* of Texas, *Jeffrey Amestoy* of Vermont, *Mary Sue Terry* of Virginia, and *Charles G. Brown* of West Virginia; for the Environmental Defense Fund et al. by *Victor M. Sher, Todd D. True*, and *Tom Lustig;* and for the International Association of Fish and Wildlife Agencies by *Paul A. Lenzini.*

Briefs of *amici curiae* were filed for the Center for Enviromental Education by *Nicholas C. Yost* and *William A. Butler;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Robin L. Rivett.*

JUSTICE STEVENS delivered the opinion of the Court.

This case is a companion to *Robertson* v. *Methow Valley Citizens Council*, *ante*, p. 332. It arises out of a controversial decision to construct a dam at Elk Creek in the Rogue River Basin in southwest Oregon. In addition to the question whether an Environmental Impact Statement (EIS) prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*, must contain a complete mitigation plan and a "worst case analysis," which we answered in *Robertson*, it presents the question whether information developed after the completion of the EIS requires that a supplemental EIS be prepared before construction of the dam may continue.

I

In the 1930's in response to recurring floods in the Rogue River Basin, federal and state agencies began planning a major project to control the water supply in the Basin.[1] See, *e. g.*, ch. 346, 49 Stat. 439. In 1961 a multiagency study recommended the construction of three large dams: the Lost Creek Dam on the Rogue River, the Applegate Dam on the Applegate River, and the Elk Creek Dam on the Elk Creek near its confluence with the Rogue River. See H. R. Doc. No. 566, 87th Cong., 2d Sess., 7–89 (1962). The following year, Congress authorized the Army Corps of Engineers (Corps) to construct the project in accordance with the recommendations of the 1961 study. See Flood Control Act of 1962, Pub. L. 87–874, § 203, 76 Stat. 1192–1193. The Lost Creek Dam was completed in 1977, and the Applegate Dam was completed in 1981.

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[1] As described by the Army Corps of Engineers:

"Lying within the southwest corner of Oregon, the Rogue River Basin drains a 5,060 square mile area in Jackson, Josephine, Coos, and Klamath Counties, as well as small portions of Del Norte and Siskiyou Counties in California . . . . Rogue River passes through vastly different environmental settings in the course of its journey from its upper reaches near Crater Lake to the Pacific Ocean at Gold Beach, Oregon. The climatological factors and other characteristics of the basin are such that floods are frequently experienced." U. S. Army Corps of Engineers, Portland District, Elk Creek Lake Environmental Impact Statement, Supplement No. 1, p. 1 (Dec. 1980) (hereinafter FEISS).

Plans for the Elk Creek Dam describe a 238-foot-high concrete structure that will control the run-off from 132 square miles of the 135-square-mile Elk Creek watershed. When full, the artificial lake behind the dam will cover 1,290 acres of land, will have an 18-mile shoreline, and will hold 101,000 acre-feet of water. The dam will cost approximately $100 million to construct and will produce annual benefits of almost $5 million. It will be operated in coordination with the nearby Lost Creek Dam, where the control center for both dams will be located. Its "multiport" structure, which will permit discharge of water from any of five levels, makes it possible to regulate, within limits, the temperature, turbidity,[2] and volume of the downstream flow. Although primarily designed to control flooding along the Rogue River, additional project goals include enhanced fishing, irrigation, and recreation.

In 1971, the Corps completed its EIS for the Elk Creek portion of the three-dam project and began development by acquiring 26,000 acres of land and relocating residents, a county road, and utilities. Acknowledging incomplete information, the EIS recommended that further studies concerning the project's likely effect on turbidity be developed. The results of these studies were discussed in a draft supplemental EIS completed in 1975. However, at the request of the Governor of Oregon, further work on the project was suspended, and the supplemental EIS was not filed to make it possible to analyze the actual consequences of the construction of the Lost Creek Dam, which was nearing completion, before continuing with the Elk Creek project. Following that analysis and the receipt of a statement from the Governor that he was "extremely interested in pursuing construction of the Elk Creek Dam,"[3] the Corps completed and released its final Environmental Impact Statement, Supplement No. 1 (FEISS), in December 1980.

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[2] "Turbidity is an expression of the optical property of water which causes light to be scattered and absorbed rather than transmitted through in straight lines. Turbidity is caused by the presence of suspended matter." *Id.*, App. E, p. 3. This optical property of water is most commonly measured using the Jackson Turbidity Unit (JTU). "A general rule of thumb guideline is that 5 JTU is the limit for drinking water, 10 JTU impairs flyfishing, 20 JTU impairs other fishing methods, and long-term 50 JTU water alters fish behavior." *Id.*, at 21.

Because the Rogue River is one of the Nation's premier fishing grounds, the FEISS paid special heed to the effects the dam might have on water quality, fish production, and angling. In its chapter on the environmental effects of the proposed project, the FEISS explained that water quality studies were prepared in 1974 and in 1979 and that "[w]ater temperature and turbidity have received the most attention." FEISS 33. Using computer simulation models, the 1974 study predicted that the Elk Creek Dam might, at times, increase the temperature of the Rogue River by one to two degrees Fahrenheit and its turbidity by one to three JTU's.[4] *Ibid.* The 1979 study took a second look at the potential effect of the Elk Creek Dam on turbidity and, by comparing the 1974 study's predictions concerning the effects of the Lost Creek Dam with actual measurements taken after that dam became operational, it "increased technical confidence in the mathematical model predictions . . . and reinforced the conclusions of the 1974 [study]." *Id.*, at 33–34. Based on these studies, the FEISS predicted that changes in the "turbidity regime" would not have any major effect on fish production,[5] but that the combined effect of the Lost Creek and Elk Creek Dams on the turbidity of the Rogue River might, on occasion, impair fishing.[6]

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[3] See Letter from Governor Atiyeh of August 1, 1979, reprinted in *id.*, App. F.

[4] See n. 2, *supra*.

[5] The FEISS explained that suspended sediments can reduce fish production by clogging or injuring gill structures, by causing abrasions, by reducing food supply, and by making it more difficult for fish to locate what food is available by reducing visibility. FEISS 37. The study nonetheless concluded:

Other adverse effects described by the FEISS include the displacement of wildlife population—including 100 black-tailed deer and 17 elk—and the loss of forest land and vegetation resulting from the inundation of 1,290 acres of land with the creation of the artificial lake. *Id.*, at 26, 38, 46. Most significantly, it is perfectly clear that the dam itself would interfere with the migration and spawning of a large number

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"Much of the heavy suspended materials will settle out in Elk Creek reservoir so no downstream effect of siltation is expected. Average annual downstream turbidity will be the same with or without the project.

"No major adverse effect on fish production in the Rogue River is expected as a result of the changes in the turbidity regime as a result of the Elk Creek project. Minor effects on production can be expected in the reach of Elk Creek between the project and its confluence with the Rogue River during normal years when turbidity will be higher than without the project. However, the project will also provide periods when turbidity will be lower than without the project. The multi-level withdrawal capability which will be built into the Elk Creek project will provide the ability to minimize turbidity effects on fish production." *Ibid.*

[6] The impact on fishing is described as follows:

"Increases in magnitude and extended duration of turbidity in the Rogue River are expected to result from operation of Elk Creek Dam. These increases could affect angling for salmonids in the Rogue because the ability of fish to see lures or flies is impaired by turbidity. Fly-fishing for resident trout and summer steelhead would be the most vulnerable to effects of turbidity. The fly-fishing season runs from late July into October. According to Rogue River guides and [Oregon Department of Fish and Wildlife] biologists, fly-fishing success declines at a turbidity level of 10 JTU or greater. Other fishing methods are not productive when turbidity exceeds 20 JTU. It is possible that fisheries at other times, such as in the winter, will be affected for short periods. It is not expected that outflow from Lost Creek and Elk Creek Dams would, under the worst conditions, ever cause turbidity in the Rogue River to exceed 13 JTUs during late summer and early fall." *Id.*, at 36.

A "salmonid" is a soft-finned, elongated fish that has an upturned final vertebrae. See Webster's Third International Dictionary 2004 (1981). Salmon and trout are two common salmonids. *Ibid.*

of anadromous fish,[7] but this effect has been mitigated by the construction of a new hatchery.[8] *Id.*, at 35. Finally, the FEISS found that no endangered or threatened species would be affected by the project. *Id.*, at 27.

On February 19, 1982, after reviewing the FEISS, the Corps' Division Engineer made a formal decision to proceed with construction of the Elk Creek Dam, "subject to the approval of funds by the United States Congress." App. to Pet. for Cert. 53a. In his decision, he identified the mitigation measures that had already been taken with respect to the loss of anadromous fish spawning habitat, as well as those that would "most likely" be taken to compensate for the loss of other wildlife habitat. *Id.*, at 56a–57a. He concluded that the benefits that would be realized from the project "outweigh the economic and environmental costs" and that completion would serve "the overall public interest." *Id.*, at 58a. In August 1985, Congress appropriated the necessary funds.[9] Act of Aug. 15, 1985, Pub. L. 99–88, 99 Stat. 314. The dam is now about one-third completed and the creek has been rechanneled through the dam.

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[7] "Anadromous fish are those which spend most of their life in the open sea, but which return as adults to freshwater streams . . . to spawn." *Puyallup Tribe, Inc.* v. *Washington Game Dept.*, 433 U. S. 165, 168 (1977).

[8] As described in the FEISS:

"Cole M. Rivers Fish Hatchery was constructed to mitigate the loss of anadromous fish-spawning habitat in Elk Creek, Applegate River, and the upper Rogue River, as well as to provide rainbow trout and kokanee for stocking in the reservoirs as mitigation for lost trout production. The hatchery is located about 0.2 miles downstream of Lost Creek Dam. It has a design capacity of 355,000 pounds of salmon and steelhead and 71,000 pounds of trout and kokanee. Production for Elk Creek would utilize approximately 14 percent of the total design capacity . . . ." FEISS 35.

[9] In the Report accompanying this legislation the Senate Appropriations Committee stressed that it "included specific language in the legislation directing the Secretary of the Army, acting through the Chief of Engineers, to award a continuing contract for construction of the main dam for the Elk Creek Lake project." S. Rep. No. 99–82, p. 97 (1985).

II

In October 1985, four Oregon nonprofit corporations[10] filed this action in the United States District Court for the District of Oregon seeking to enjoin construction of the Elk Creek Dam. Their principal claims were that the Corps violated NEPA by failing (1) to consider the cumulative effects of the three dams on the Rogue River Basin in a single EIS; (2) adequately to describe the environmental consequences of the project; (3) to include a "worst case analysis" of uncertain effects; and (4) to prepare a second supplemental EIS to review information developed after 1980.

After conducting a hearing on respondents' motion for a preliminary injunction, the District Judge denied relief on each of the NEPA claims.[11] 628 F. Supp. 1557 (1986). He first held that courts must employ a standard of "reasonableness" in reviewing an agency's compliance with NEPA. Under this standard of review, the court must "'make a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation.'" *Id.*, at 1562 (quoting *California* v. *Block*, 690 F. 2d 753, 761 (CA9 1982)). Applying this standard, the District Judge concluded that the Corps had, in fact, taken a sufficiently "hard look" at the cumulative effects of the three dams and at the individual effects of the Elk Creek Dam. 628 F. Supp., at 1563–1565. He also concluded that a "worst case analysis" was not required because the Corps used state-of-the-art mathematical models, thus avoiding scientific uncertainty and the need to fill gaps in information with a worst case scenario. *Id.*, at 1567. Finally, the District Court held that the Corps' decision not to prepare a second supplemental EIS to address new information was "reasonable."

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[10] The four corporations, which are respondents herein, are the Oregon Natural Resources Council, the Oregon Guides and Packers Association, Inc., the Rogue Fly-fishers, Inc., and the Rogue River Guides Association.

[11] Respondents' complaint also included claims under the Wild and Scenic Rivers Act (WASRA), 16 U. S. C. § 1278, and the Freedom of Information Act (FOIA), 5 U. S. C. § 552. However, prior to the hearing, respondents withdrew their WASRA claim. In order to facilitate prompt consideration of respondents' motion for a preliminary injunction on the NEPA claims, the District Judge postponed consideration of the FOIA claim for a later date. After considering the NEPA claims, the District Judge directed the entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b) to permit prompt appellate review.

The new information relied upon by respondents is found in two documents. The first, an internal memorandum prepared by two Oregon Department of Fish and Wildlife (ODFW) biologists based upon a draft ODFW study, suggested that the dam will adversely affect downstream fishing, and the second, a soil survey prepared by the United States Soil Conservation Service (SCS), contained information that might be taken to indicate greater downstream turbidity than did the FEISS. As to both documents, the District Judge concluded that the Corps acted reasonably in relying on the opinions of independent and Corps experts discounting the significance of the new information. *Id.*, at 1567–1568. At the conclusion of his opinion, the District Judge directed that the motion for preliminary relief be consolidated with trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2), and thus denied respondents' claim for a permanent injunction as well.

The Court of Appeals reversed. 832 F. 2d 1489 (CA9 1987). Applying the same "reasonableness" standard of review employed by the District Court, the Court of Appeals reached a contrary conclusion, holding that the Corps had not adequately evaluated the cumulative environmental impact of the entire project. *Id.*, at 1497. Since the Corps did not seek review of that holding, we do not discuss it. The court also held that the FEISS was defective because it did not include a complete mitigation plan and because it did not contain a "worst case analysis." *Id.*, at 1493–1494, 1496–1497. These holdings were erroneous for the reasons stated in our opinion in *Robertson* v. *Methow Valley Citizens Council*, *ante*, p. 332, and will not be further discussed. With regard to the failure to prepare a second supplemental EIS, the Court of Appeals concluded that the ODFW and SCS documents brought to light "significant new information" concerning turbidity, water temperature, and epizootic[12] fish disease; that this information, although "not conclusive," is "probably accurate;" and that the Corps' experts failed to evaluate the new information with sufficient care. 832 F. 2d, at 1494–1496. The court thus concluded that a second supplemental EIS should have been prepared. Judge Wallace, writing in dissent, took issue with the majority's analysis of the new information. In his view, it was reasonable for the Corps to have concluded, based on its own expert evaluation, that the information contained in the ODFW document was inaccurate, and that the information contained in the SCS document was insignificant. *Id.*, at 1500 (opinion concurring in part and dissenting in part).

III

The subject of postdecision supplemental environmental impact statements is not expressly addressed in NEPA.[13]

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[12] An epizootic disease is one that affects many animals of the same kind at the same time. See 832 F. 2d, at 1496, n. 5.

[13] NEPA provides in pertinent part:

"The Congress authorizes and directs that, to the fullest extent possible . . . (2) all agencies of the Federal Government shall—

. . . . .

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

Preparation of such statements, however, is at times necessary to satisfy the Act's "action-forcing" purpose.[14] NEPA does not work by mandating that agencies achieve particular substantive environmental results. Rather, NEPA promotes its sweeping commitment to "prevent or eliminate damage to the environment and biosphere" by focusing Government and public attention on the environmental effects of proposed agency action. 42 U. S. C. § 4321. By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct. See *Robertson*, *ante*, at 349. Similarly, the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time. *Ante*, at 349–350. It would be incongruous with this approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval. As we explained in *TVA* v. *Hill*, 437 U. S. 153, 188, n. 34 (1978), although "it would make sense to

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"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 83 Stat. 853, 42 U. S. C. § 4332.

[14] Cf. Andreen, In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy, 64 Ind. L. J. 205, 247–248 (1989) (Supplementation is at times necessary because "[t]he entire efficacy of the EIS process is called into question when changes are made to a project after the publication of a final impact statement").

The term "action forcing" was introduced during the Senate's consideration of NEPA, see *Kleppe* v. *Sierra Club*, 427 U. S. 390, 409, n. 18 (1976), and refers to the notion that preparation of an EIS ensures that the environmental goals set out in NEPA are "infused into the ongoing programs and actions of the Federal Government," 115 Cong. Rec. 40416 (1969) (remarks of Sen. Jackson). See also 40 CFR § 1500.1(a) (1987) ("Section 102(2) contains 'action-forcing' provisions to make sure that federal agencies act according to the letter and spirit of the Act").

hold NEPA inapplicable at some point in the life of a project, because the agency would no longer have a meaningful opportunity to *weigh* the benefits of the project versus the detrimental effects on the environment," up to that point, "NEPA cases have generally required agencies to file environmental impact statements when the remaining governmental action would be environmentally 'significant.'"[15]

This reading of the statute is supported by Council on Environmental Quality (CEQ) and Corps regulations, both of which make plain that at times supplementation is required. The CEQ regulations, which we have held are entitled to substantial deference, see *Robertson, ante*, at 355–356; *Andrus* v. *Sierra Club*, 442 U. S. 347, 358 (1979), impose a duty on all federal agencies to prepare supplements to either draft or final EIS's if there "are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[16] Similarly, the Corps' own NEPA implementing regulations require the preparation of a supplemental EIS if "new significant impact information, criteria or circumstances relevant to environmental considerations impact on the recommended plan or proposed action."[17]

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[15] In support of this latter proposition, we cited *Environmental Defense Fund* v. *TVA*, 468 F. 2d 1164 (CA6 1972), with approval. In that case the Court of Appeals upheld an injunction barring the continued construction of a dam on the Little Tennessee River pending the filing of an adequate EIS, notwithstanding the fact that the project was initially approved and construction commenced prior to the effective date of NEPA.

[16] The CEQ regulation provides, in part:

"Agencies:

"(1) Shall prepare supplements to either draft or final environmental impact statements if:

"(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

"(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

"(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so." 40 CFR § 1502.9(c) (1987).

The parties are in essential agreement concerning the standard that governs an agency's decision whether to prepare a supplemental EIS. They agree that an agency should apply a "rule of reason," and the cases they cite in support of this standard explicate this rule in the same basic terms. These cases make clear that an agency need not supplement an EIS every time new information comes to light after the EIS is finalized.[18] To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.[19] On the other hand, and as petition-

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[17] The Corps regulations provide in relevant part:

"*Supplements.* A Supplement to the draft or final EIS on file will be prepared whenever significant impacts resulting from changes in the proposed plan or new significant impact information, criteria or circumstances relevant to environmental considerations impact on the recommended plan or proposed action as discussed in 40 CFR 1502.9(c). A supplement to a draft EIS will be prepared, filed and circulated in the same manner as a draft EIS . . . . A supplement to a final EIS will be prepared and filed first as a *draft* supplement and then as a *final* supplement. . . ." 33 CFR § 230.11(b) (1987).

[18] Compare *Warm Springs Dam Task Force* v. *Gribble*, 621 F. 2d 1017, 1024 (CA9 1980) (cited in Brief for Respondents 32), and *Stop H-3 Assn.* v. *Dole*, 740 F. 2d 1442, 1463–1464 (CA9 1984) (same), cert. denied, 471 U. S. 1108 (1985), with *Cuomo* v. *NRC*, 249 U. S. App. D. C. 54, 57, 772 F. 2d 972, 975 (1985) *(per curiam)* (cited in Reply Brief for Petitioners 14), and *Friends of the River* v. *FERC*, 231 U. S. App. D. C. 329, 345, 720 F. 2d 93, 109 (1983) (same).

[19] In other contexts we have observed:

"'Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated. . . . If upon the coming down of the order litigants might demand rehearing as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to re-ers concede, NEPA does require that agencies take a "hard look" at the environmental effects of their planned action, even after a proposal has received initial approval. See Brief for Petitioners 36. Application of the "rule of reason" thus turns on the value of the new information to the still pending decisionmaking process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains "major Federal actio[n]" to occur, and if the new information is sufficient to show that the remaining action will "affec[t] the quality of the human environment" in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.[20] Cf. 42 U. S. C. § 4332(2)(C).

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opening.'" *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 554–555 (1978) (quoting *ICC* v. *Jersey City*, 322 U. S. 503, 514 (1944)). See also *Northern Lines Merger Cases*, 396 U. S. 491, 521 (1970) (same).

[20] CEQ regulations define the term "significantly" as follows:

"'Significantly' as used in NEPA requires considerations of both context and intensity:

"(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. . . .

"(b) *Intensity.* This refers to the severity of impact. . . . The following should be considered in evaluation of intensity:

"(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

"(2) The degree to which the proposed action affects public health or safety.

"(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

"(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

[Footnote 20 is continued on p. 375]

The parties disagree, however, on the standard that should be applied by a court that is asked to review the agency's decision. Petitioners argue that the reviewing court need only decide whether the agency decision was "arbitrary and capricious," whereas respondents argue that the reviewing court must make its own determination of reasonableness to ascertain whether the agency action complied with the law. In determining the proper standard of review, we look to § 10e of the Administrative Procedure Act (APA), 5 U. S. C. § 706, which empowers federal courts to "hold unlawful and set aside agency action, findings, and conclusions" if they fail to conform with any of six specified standards.[21] We conclude

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"(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

"(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about future consideration.

"(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. . . .

"(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historic resources.

"(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat . . . .

"(10) Whether the action threatens a violation of Federal, State, or local law . . . ." 40 CFR § 1508.27 (1987).

[21] Title 5 U. S. C. § 706(2) provides that a reviewing court shall

"hold unlawful and set aside agency action, findings, and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or that review of the narrow question before us whether the Corps' determination that the FEISS need not be supplemented should be set aside is controlled by the "arbitrary and capricious" standard of § 706(2)(A).

Respondents contend that the determination whether the new information suffices to establish a "significant" effect is either a question of law or, at a minimum, a question of ultimate fact and, as such, "deserves no deference" on review. Brief for Respondents 29. Apparently, respondents maintain that the question for review centers on the legal meaning of the term "significant" or, in the alternative, the predominantly legal question whether established and uncontested historical facts presented by the administrative record satisfy this standard. Characterizing the dispute in this manner, they posit that strict review is appropriate under the "in accordance with law" clause of § 706(2)(A) or the "without observance of procedure required by law" provision of § 706 (2)(D). We disagree.

The question presented for review in this case is a classic example of a factual dispute the resolution of which implicates substantial agency expertise. Respondents' claim that the Corps' decision not to file a second supplemental EIS should be set aside primarily rests on the contentions that the new information undermines conclusions contained in the FEISS, that the conclusions contained in the ODFW memorandum and the SCS survey are accurate, and that the Corps' expert review of the new information was incomplete, incon-

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"(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

It is uncontested that the present controversy is not controlled by §§ 706(2)(E) or 706(2)(F), which primarily apply in cases involving either agency rulemaking or adjudication. Nor is there a claim that the Corps exceeded its constitutional authority under § 706(2)(B) or its statutory authority under § 706(2)(C).

clusive, or inaccurate. The dispute thus does not turn on the meaning of the term "significant" or on an application of this legal standard to settled facts. Rather, resolution of this dispute involves primarily issues of fact.[22] Because analysis of the relevant documents "requires a high level of technical expertise," we must defer to "the informed discretion of the responsible federal agencies." *Kleppe* v. *Sierra Club*, 427 U. S. 390, 412 (1976). See also *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U. S. 87, 103 (1983) ("When examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential"). Under these circumstances, we cannot accept respondents' supposition that review is of a legal question and that the Corps' decision "deserves no deference." Accordingly, as long as the Corps' decision not to supplement the FEISS was not "arbitrary or capricious," it should not be set aside.[23]

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[22] Of course, whenever a court reviews an agency decision or action under the APA, *some* legal standard is involved. Otherwise, there would be "no law to apply" and thus no basis for APA review. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 410 (1971) (discussing 5 U. S. C. § 701(a)(2)).

[23] Respondents note that several Courts of Appeals, including the Court of Appeals for the Ninth Circuit as articulated in this and other cases, have adopted a "reasonableness" standard of review, see, *e. g.*, *Sierra Club* v. *Froehlke*, 816 F. 2d 205, 210 (CA5 1987); *Enos* v. *Marsh*, 769 F. 2d 1363, 1373 (CA9 1985); *National Wildlife Federation* v. *Marsh*, 721 F. 2d 767, 782 (CA11 1983); *Massachusetts* v. *Watt*, 716 F. 2d 946, 948 (CA1 1983); *Monarch Chemical Works, Inc.* v. *Thone*, 604 F. 2d 1083, 1087–1088 (CA8 1979), and argue that we should not upset this well-settled doctrine. This standard, however, has not been adopted by all of the Circuits. See, *e. g.*, *Wisconsin* v. *Weinberger*, 745 F. 2d 412, 417 (CA7 1984) (adopting "arbitrary and capricious" standard). Moreover, as some of these courts have recognized, the difference between the "arbitrary and capricious" and "reasonableness" standards is not of great pragmatic consequence. See *Manasota-88, Inc.* v. *Thomas*, 799 F. 2d 687, 692, n. 8 (CA11 1986) ("As a practical matter, . . . the differences between the 'reasonableness' and 'arbitrary and capricious' standards of review are often difficult to discern"); *River Road Alliance, Inc.* v. *Corps of Engineers of United States Army*,

As we observed in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 416 (1971), in making the factual inquiry concerning whether an agency decision was "arbitrary or capricious," the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." This inquiry must "be searching and careful," but "the ultimate standard of review is a narrow one." *Ibid.* When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive. On the other hand, in the context of reviewing a decision not to supplement an EIS, courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information. A contrary approach would not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that agency decisions are founded on a reasoned evaluation "of the relevant factors."

IV

Respondents' argument that significant new information required the preparation of a second supplemental EIS rests on two written documents. The first of the documents is the so-called "Cramer Memorandum," an intraoffice memorandum prepared on February 21, 1985, by two scientists employed by ODFW. See Cramer Memorandum 3a.[24] The Cramer Memorandum, in turn, relied on a draft ODFW

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764 F. 2d 445, 449 (CA7 1985) ("[W]e are not sure how much if any practical difference there is between 'abuse of discretion' and 'unreasonable' "), cert. denied, 475 U. S. 1055 (1986). Accordingly, our decision today will not require a substantial reworking of long-established NEPA law.

[24] The Cramer Memorandum is reprinted in the brief for petitioners. Page references are to the appendix to that brief.

study describing the effects of the Lost Creek Dam on fish production. The second document is actually a series of maps prepared in 1982 by SCS to illustrate the composition of soil near the Elk Creek shoreline. The information was provided to the Corps for use in managing the project. Although respondents contend that the maps contained data relevant to a prediction of the dam's impact on downstream turbidity, the maps do not purport to shed any light on that subject. Nor do they purport to discuss any conditions that had changed since the FEISS was completed in 1980. The Corps responded to the claim that these documents demonstrate the need for supplementation of the FEISS by preparing a formal Supplemental Information Report, dated January 10, 1986. See U. S. Army Corps of Engineers, Portland District, Elk Creek Lake Supplemental Information Report No. 2, p. 7a (hereinafter SIR).[25] The SIR explained: "While it is clear based upon our review that this information does not require additional NEPA documentation, Corps regulations provide that a Supplemental Information Report can be used to disseminate information on points of concern regarding environmental impacts set forth in the EIS."[26]

The significance of the Cramer Memorandum and the SCS survey is subject to some doubt. Before respondents commenced this litigation in October 1985, no one had suggested that either document constituted the kind of new information that made it necessary or appropriate to supplement the FEISS. Indeed, the record indicates that the Corps was not provided with a copy of the Cramer Memorandum until after the lawsuit was filed. Since the probative value of that document depends largely on the expert qualification of its authors, the fact that they did not see fit to promptly apprise the Corps of their concern—or to persuade ODFW to do so—tends to discount the significance of those concerns. Similarly, the absence of any pretrial expression of concern about the soil characteristics described in the 1982 SCS survey is consistent with the view that it shed little, if any, new light on the turbidity potential of the dam. Yet, even if both documents had given rise to prompt expressions of concern, there are good reasons for concluding that they did not convey significant new information requiring supplementation of the FEISS.

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[25] The SIR is reprinted in the brief for petitioners. Page references are to the appendix to that brief.

[26] Corps regulations provide:

"Whenever it is clearly understood that an EIS supplement is not necessary but where [it] is only necessary to provide supplemental information to a point of concern discussed in the final EIS . . . a supplemental information report will be prepared and filed with EPA." 33 CFR § 230.11(d) (1987).

The Court of Appeals attached special significance to two concerns discussed in the Cramer Memorandum: the danger that an increase in water temperature downstream during fall and early winter will cause an early emergence and thus reduce survival of spring chinook fry and the danger that the dam will cause high fish mortality from an epizootic disease. Both concerns were based partly on fact and partly on speculation.

With respect to the first, the Cramer Memorandum reported that the authors of the draft ODFW study had found that warming of the Rogue River caused by the Lost Creek Dam had reduced the survival of spring chinook fry; however, the extent of that reduction was not stated, nor did the memorandum estimate the extent of warming to be expected due to closure of the Elk Creek Dam. Instead, the memorandum estimated that an increase of only one degree centigrade in river temperature in January would decrease survival of spring chinook "from by 60–80%." Cramer Memorandum 3a. The authors of the memorandum concluded that because the Elk Creek Dam is likely to increase the temperature of the Rogue River, further evaluation of this effect should be completed "before ODFW sets its final position on this project." *Ibid.*

The Corps' response to this concern in its SIR acknowledged that the "biological reasoning is sound and has been recognized for some time," but then explained why the concern was exaggerated. SIR 10a. The SIR stressed that because the model employed by ODFW had not been validated, its predictive capability was uncertain. Indeed, ODFW scientists subsequently recalculated the likely effect of a one-degree-centigrade increase in temperature, adjusting its estimate of a 60-to-80 percent loss downward to between 30 and 40 percent. *Id.*, at 9a. Moreover, the SIR supplied a variable missing in the Cramer Memorandum, suggesting that the Elk Creek Dam would, in most cases, either reduce or leave unchanged the temperature of the Rogue River. *Id.*, at 10a. Discernible increases were only found in July, August, and December of the study year, and even during those months the maximum temperature increase was only 0.6 degrees centigrade. *Ibid.* Finally, the SIR observed that the Cramer Memorandum failed to take into account the dam's beneficial effects, including its ability to reduce peak downstream flow during periods of egg incubation and fry rearing and its ability to reduce outflow temperature through use of the multiport structure.[27] *Id.*, at 9a–10a. Given these

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[27] In this respect, the SIR noted that "[t]he reduction in peak floodflows can partially or fully offset the negative effects of temperature increases on fry survival," and any remaining adverse effects can be "further mitigated by the ability of the intake tower to regulate outflow temperatures." SIR 9a–10a. A letter sent from ODFW to the Corps in August 1985 supports the conclusion that the multiport system can be used to regulate temperature. The letter, reporting on an attempt to reduce outflow temperature at the Lost Creek Dam, asserts:

"The experimental reduction in outflow temperatures last October and November, in conjunction with other factors, appears to have improved survival to the fry stage. We had the lowest number on record of wild fish spawning, yet this spring we had the second highest abundance of spring chinook fry on record. The low density of spawners, the absence of floods last winter, and the low incubation temperatures all contributed to the high survival of chinook eggs. We do not know yet what the river temperatures last October-November would have been without the dam, but re-positive factors, the Corps concluded that any adverse effects of the 0.6-degree temperature increase can be offset. *Id.*, at 10a.

With respect to the second concern emphasized by the Court of Appeals, the Cramer Memorandum reported the fact that "an unprecedented 76% of the fall chinook in 1979 and 32% in 1980 were estimated to have died before spawning" and then speculated that the Lost Creek Dam, which had been completed in 1977, was a contributing cause of this unusual mortality.[28] Cramer Memorandum 4a. The Corps responded to this by pointing out that the absence of similar epizootics after the closure of the Applegate Dam and the evidence of prespawning mortality in the Rogue River prior to the closing of the Lost Creek Dam were inconsistent with the hypothesis suggested in the Cramer Memorandum. See SIR 10a–11a. In addition, the Corps noted that certain diseased organisms thought to have been the cause of the unusually high mortality rates were not found in the outflow from the Lost Creek Dam.[29] *Id.*, at 11a.

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lease temperatures were lower than previous years since dam closure." Letter from Dr. John R. Donaldson of August 15, 1985, Admin. Record, Doc. No. 109.

[28] The authors made clear that their concern was not based on any identifiable nexus between the dam closure and the epizootics:

"We have not determined the actual cause of the epizootics in 1979 and 1980, but we suspect that Lost Creek Dam contributed to them because no such mortality of fall chinook had been documented previously." Cramer Memorandum 4a.

As Judge Wallace noted in his dissenting opinion, the Cramer Memorandum did not address the possibility that diseased hatchery fish, rather than the Lost Creek Dam, caused the 1979 and 1980 epizootics. See 832 F. 2d 1489, 1501 (CA9 1987) (opinion concurring in part and dissenting in part).

[29] The Cramer Memorandum also raised concerns about the effect of increased downstream flow on fishing and fish production. The memorandum explained that "[a]nglers and guides have complained that high flows have 'washed out' many of their favorite fishing riffles and that fly angling is no longer effective in most areas because the water is too deep and swift." *Id.*, at 4a. In addition, the memorandum observed that "in-

In thus concluding that the Cramer Memorandum did not present significant new information requiring supplementation of the FEISS, the Corps carefully scrutinized the proffered information. Moreover, in disputing the accuracy and significance of this information, the Corps did not simply rely on its own experts. Rather, two independent experts hired by the Corps to evaluate the ODFW study on which the Cramer Memorandum was premised found significant fault in the methodology and conclusions of the study.[30] We also think it relevant that the Cramer Memorandum did not express the official position of ODFW. See SIR 9a. In preparing the memorandum, the authors noted that the agency had "adopted a neutral stand on Elk Creek Dam" and argued that new information raised the question whether "our agency should continue to remain neutral."[31] Cramer Memo-

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creased flows during September and October cause spring chinook to spawn higher on the gravel bars and this increases the chances that redds will be dewatered when flows are reduced as the dams fill during February-April." *Ibid.* However, as the SIR observed, the FEISS did indicate that construction of the dam would cause some unavoidable adverse effects on fishing. See SIR 11a. Moreover, the Cramer Memorandum did not suggest that there has been, or will likely be, any significant increase in mortality due to dewatering or that this effect cannot be minimized through control of the dam's outflow. *Ibid.*

[30] The first of these experts, although agreeing with portions of the ODWF study, indicated that the study "contains considerable statistical inaccuracies, over-extension of statistical methods and undue biological speculation that detracts from an otherwise very laudable professional effort." S. B. Mathews, Critique of Lost Creek Dam Fisheries Evaluation 1, Admin. Record, Doc. No. 112. The second, although providing a generally more positive assessment of the study, indicated that comparisons between predam and postdam years "is not likely to yield conclusive results." L. Calvin, Lost Creek Dam Fisheries Evaluation, Phase I Completion Report 2, Admin. Record, Doc. No. 114.

[31] Their memorandum concluded:

"Harry, the spring chinook runs on the Rogue are at an all-time low point. Anglers are becoming increasingly frustrated and upset about low runs, shortened seasons and smaller bag limits. They are also becoming more vocal. We feel the agency stands to lose much of its credibility if we conrandum 3a. The concerns disclosed in the memorandum apparently were not sufficiently serious to persuade ODFW to abandon its neutral position.

The Court of Appeals also expressed concern that the SCS survey, by demonstrating that the soil content in the Elk Creek watershed is different than assumed in the FEISS, suggested a greater turbidity potential than indicated in the FEISS. 832 F. 2d, at 1495. In addition, the court observed that ODFW scientists believe that logging and road building in the Elk Creek watershed has caused increased soil disturbance resulting in higher turbidity than forecast by the FEISS. *Ibid.* As to this latter point, the SIR simply concluded that although turbidity may have increased in the early 1980's due to logging, "watershed recovery appears to have occurred to reduce the turbidity levels back to those of the 1970's." SIR 12a. The implications of the SCS soil survey are of even less concern. As discussed in the FEISS, water quality studies were conducted in 1974 and 1979 using computer simulation models. FEISS 33. The 1974 study indicated that turbidity in the Rogue River would increase by no more than one to three JTU's as a result of the Elk Creek Dam, and the 1979 study verified this result. *Ibid.* These studies used water samples taken from Elk Creek near the proposed dam site and from near the Lost Creek Dam, and thus did not simply rely on soil composition maps in drawing their conclusions. *Id.*, at 18–19, 21–22, 33–34. Although the SIR did not expressly comment on the SCS survey, in light of the in-depth 1974 and 1979 studies, its conclusion that "the turbidity effects are not expected to differ from those described in the 1980 EISS" surely provided a legitimate rea-

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tinue to support Elk Creek Dam after knowing what has occurred to the adult spring chinook returns following completion of Lost Creek Dam. The Commission should be made aware of this new information and the possible consequences if they continue to hold to the middle of the road." Cramer Memorandum 5a.

son for not preparing a supplemental FEISS to discuss the subject of turbidity. SIR 12a.

There is little doubt that if all of the information contained in the Cramer Memorandum and SCS survey was both new and accurate, the Corps would have been required to prepare a second supplemental EIS. It is also clear that, regardless of its eventual assessment of the significance of this information, the Corps had a duty to take a hard look at the proffered evidence. However, having done so and having determined based on careful scientific analysis that the new information was of exaggerated importance, the Corps acted within the dictates of NEPA in concluding that supplementation was unnecessary. Even if another decisionmaker might have reached a contrary result, it was surely not "a clear error of judgment" for the Corps to have found that the new and accurate information contained in the documents was not significant and that the significant information was not new and accurate. As the SIR demonstrates, the Corps conducted a reasoned evaluation of the relevant information and reached a decision that, although perhaps disputable, was not "arbitrary or capricious."

The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

GRAHAM *v.* CONNOR ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87-6571. Argued February 21, 1989—Decided May 15, 1989

Petitioner Graham, a diabetic, asked his friend, Berry, to drive him to a convenience store to purchase orange juice to counteract the onset of an insulin reaction. Upon entering the store and seeing the number of people ahead of him, Graham hurried out and asked Berry to drive him to a friend's house instead. Respondent Connor, a city police officer, became suspicious after seeing Graham hastily enter and leave the store, followed Berry's car, and made an investigative stop, ordering the pair to wait while he found out what had happened in the store. Respondent backup police officers arrived on the scene, handcuffed Graham, and ignored or rebuffed attempts to explain and treat Graham's condition. During the encounter, Graham sustained multiple injuries. He was released when Connor learned that nothing had happened in the store. Graham filed suit in the District Court under 42 U. S. C. § 1983 against respondents, alleging that they had used excessive force in making the stop, in violation of "rights secured to him under the Fourteenth Amendment to the United States Constitution and 42 U. S. C. § 1983." The District Court granted respondents' motion for a directed verdict at the close of Graham's evidence, applying a four-factor test for determining when excessive use of force gives rise to a § 1983 cause of action, which inquires, *inter alia*, whether the force was applied in a good-faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm. *Johnson* v. *Glick*, 481 F. 2d 1028. The Court of Appeals affirmed, endorsing this test as generally applicable to all claims of constitutionally excessive force brought against government officials, rejecting Graham's argument that it was error to require him to prove that the allegedly excessive force was applied maliciously and sadistically to cause harm, and holding that a reasonable jury applying the *Johnson* v. *Glick* test to his evidence could not find that the force applied was constitutionally excessive.

Held: All claims that law enforcement officials have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a substantive due process standard. Pp. 392–399.

(a) The notion that all excessive force claims brought under § 1983 are governed by a single generic standard is rejected. Instead, courts must identify the specific constitutional right allegedly infringed by the challenged application of force and then judge the claim by reference to the specific constitutional standard which governs that right. Pp. 393–394.

(b) Claims that law enforcement officials have used excessive force in the course of an arrest, investigatory stop, or other "seizure" of a free citizen are most properly characterized as invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons . . . against unreasonable seizures," and must be judged by reference to the Fourth Amendment's "reasonableness" standard. Pp. 394–395.

(c) The Fourth Amendment "reasonableness" inquiry is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation. Pp. 396–397.

(d) The *Johnson* v. *Glick* test applied by the courts below is incompatible with a proper Fourth Amendment analysis. The suggestion that the test's "malicious and sadistic" inquiry is merely another way of describing conduct that is objectively unreasonable under the circumstances is rejected. Also rejected is the conclusion that because individual officers' subjective motivations are of central importance in deciding whether force used against a convicted prisoner violates the Eighth Amendment, it cannot be reversible error to inquire into them in deciding whether force used against a suspect or arrestee violates the Fourth Amendment. The Eighth Amendment terms "cruel" and "punishments" clearly suggest some inquiry into subjective state of mind, whereas the Fourth Amendment term "unreasonable" does not. Moreover, the less protective Eighth Amendment standard applies only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. Pp. 397–399.

827 F. 2d 945, vacated and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 399.

H. Gerald Beaver argued the cause for petitioner. On the briefs was *Richard B. Glazier.*

Mark I. Levy argued the cause for respondents. On the brief was *Frank B. Aycock III.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires us to decide what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other "seizure" of his person. We hold that such claims are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a substantive due process standard.

In this action under 42 U. S. C. § 1983, petitioner Dethorne Graham seeks to recover damages for injuries allegedly sustained when law enforcement officers used physical force against him during the course of an investigatory stop. Because the case comes to us from a decision of the Court of Appeals affirming the entry of a directed verdict for respondents, we take the evidence hereafter noted in the light most favorable to petitioner. On November 12, 1984, Graham, a diabetic, felt the onset of an insulin reaction. He asked a friend, William Berry, to drive him to a nearby convenience store so he could purchase some orange juice to counteract the reaction. Berry agreed, but when Graham entered the store, he saw a number of people ahead of him in the check-

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Assistant Attorney General Clegg, David L. Shapiro, Brian J. Martin,* and *David K. Flynn;* and for the American Civil Liberties Union et al. by *Steven R. Shapiro.*

Lacy H. Thornburg, Attorney General of North Carolina, *Isaac T. Avery III,* Special Deputy Attorney General, and *Linda Anne Morris,* Assistant Attorney General, filed a brief for the State of North Carolina as *amicus curiae* urging affirmance.

out line. Concerned about the delay, he hurried out of the store and asked Berry to drive him to a friend's house instead.

Respondent Connor, an officer of the Charlotte, North Carolina, Police Department, saw Graham hastily enter and leave the store. The officer became suspicious that something was amiss and followed Berry's car. About one-half mile from the store, he made an investigative stop. Although Berry told Connor that Graham was simply suffering from a "sugar reaction," the officer ordered Berry and Graham to wait while he found out what, if anything, had happened at the convenience store. When Officer Connor returned to his patrol car to call for backup assistance, Graham got out of the car, ran around it twice, and finally sat down on the curb, where he passed out briefly.

In the ensuing confusion, a number of other Charlotte police officers arrived on the scene in response to Officer Connor's request for backup. One of the officers rolled Graham over on the sidewalk and cuffed his hands tightly behind his back, ignoring Berry's pleas to get him some sugar. Another officer said: "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M. F. but drunk. Lock the S. B. up." App. 42. Several officers then lifted Graham up from behind, carried him over to Berry's car, and placed him face down on its hood. Regaining consciousness, Graham asked the officers to check in his wallet for a diabetic decal that he carried. In response, one of the officers told him to "shut up" and shoved his face down against the hood of the car. Four officers grabbed Graham and threw him headfirst into the police car. A friend of Graham's brought some orange juice to the car, but the officers refused to let him have it. Finally, Officer Connor received a report that Graham had done nothing wrong at the convenience store, and the officers drove him home and released him.

At some point during his encounter with the police, Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; he also claims to have developed a loud ringing in his right ear that continues to this day. He commenced this action under 42 U. S. C. § 1983 against the individual officers involved in the incident, all of whom are respondents here,[1] alleging that they had used excessive force in making the investigatory stop, in violation of "rights secured to him under the Fourteenth Amendment to the United States Constitution and 42 U. S. C. § 1983." Complaint ¶ 10, App. 5.[2] The case was tried before a jury. At the close of petitioner's evidence, respondents moved for a directed verdict. In ruling on that motion, the District Court considered the following four factors, which it identified as "[t]he factors to be considered in determining when the excessive use of force gives rise to a cause of action under § 1983": (1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) "[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm." 644 F. Supp. 246, 248 (WDNC 1986). Finding that the amount of force used by the officers was "appropriate under the circumstances," that "[t]here was no discernable injury inflicted," and that the force used "was not applied maliciously or sadistically for the very purpose of causing harm," but in "a good faith effort to maintain or restore order in the face of a potentially explosive situation," *id.*, at 248–249, the District Court granted respondents' motion for a directed verdict.

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[1] Also named as a defendant was the city of Charlotte, which employed the individual respondents. The District Court granted a directed verdict for the city, and petitioner did not challenge that ruling before the Court of Appeals. Accordingly, the city is not a party to the proceedings before this Court.

[2] Petitioner also asserted pendent state-law claims of assault, false imprisonment, and intentional infliction of emotional distress. Those claims have been dismissed from the case and are not before this Court.

A divided panel of the Court of Appeals for the Fourth Circuit affirmed. 827 F. 2d 945 (1987). The majority ruled first that the District Court had applied the correct legal standard in assessing petitioner's excessive force claim. *Id.*, at 948–949. Without attempting to identify the specific constitutional provision under which that claim arose,[3] the majority endorsed the four-factor test applied by the District Court as generally applicable to all claims of "constitutionally excessive force" brought against governmental officials. *Id.*, at 948. The majority rejected petitioner's argument, based on Circuit precedent,[4] that it was error to require him to prove that the allegedly excessive force used against him was applied "maliciously and sadistically for the very purpose of causing harm."[5] *Ibid.* Finally, the majority held that a reasonable jury applying the four-part test it had just endorsed to petitioner's evidence "could not find that the force applied was constitutionally excessive." *Id.*, at 949–950. The dissenting judge argued that this Court's decisions in *Terry* v. *Ohio*, 392 U. S. 1 (1968), and *Tennessee* v. *Garner*, 471 U. S. 1 (1985), required that excessive force claims arising out of investigatory stops be analyzed under the Fourth Amendment's "objective reasonableness" standard. 827 F. 2d, at 950–952. We granted certiorari, 488 U. S. 816 (1988), and now reverse.

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[3] The majority did note that because Graham was not an incarcerated prisoner, "his complaint of excessive force did not, therefore, arise under the eighth amendment." 827 F. 2d, at 948, n. 3. However, it made no further effort to identify the constitutional basis for his claim.

[4] Petitioner's argument was based primarily on *Kidd* v. *O'Neil*, 774 F. 2d 1252 (CA4 1985), which read this Court's decision in *Tennessee* v. *Garner*, 471 U. S. 1 (1985), as mandating application of a Fourth Amendment "objective reasonableness" standard to claims of excessive force during arrest. See 774 F. 2d, at 1254–1257. The reasoning of *Kidd* was subsequently rejected by the en banc Fourth Circuit in *Justice* v. *Dennis*, 834 F. 2d 380, 383 (1987), cert. pending, No. 87–1422.

[5] The majority noted that in *Whitley* v. *Albers*, 475 U. S. 312 (1986), we held that the question whether physical force used against convicted prisoners in the course of quelling a prison riot violates the Eighth Amendment "ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" 827 F. 2d, at 948, n. 3, quoting *Whitley* v. *Albers*, *supra*, at 320–321. Though the Court of Appeals acknowledged that petitioner was not a convicted prisoner, it thought it "unreasonable . . . to suggest that a conceptual factor could be central to one type of excessive force claim but reversible error when merely considered by the court in another context." 827 F. 2d, at 948, n. 3.

Fifteen years ago, in *Johnson* v. *Glick*, 481 F. 2d 1028, cert. denied, 414 U. S. 1033 (1973), the Court of Appeals for the Second Circuit addressed a § 1983 damages claim filed by a pretrial detainee who claimed that a guard had assaulted him without justification. In evaluating the detainee's claim, Judge Friendly applied neither the Fourth Amendment nor the Eighth, the two most textually obvious sources of constitutional protection against physically abusive governmental conduct.[6] Instead, he looked to "substantive due process," holding that "quite apart from any 'specific' of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law." 481 F. 2d, at 1032. As support for this proposition, he relied upon our decision in *Rochin* v. *California*, 342 U. S. 165 (1952), which used the Due Process Clause to void a state criminal conviction based on evidence obtained by pumping the defendant's stomach. 481 F. 2d, at 1032–1033. If a police officer's use of force which "shocks the conscience" could justify setting aside a criminal conviction, Judge Friendly reasoned, a correctional officer's use of similarly excessive force must give rise to a due process violation actionable under § 1983. *Ibid.* Judge Friendly went on to set forth four factors to guide courts in determining "whether the constitutional line has been crossed" by a particular use of force—the same four factors relied upon by the courts below in this case. *Id.*, at 1033.

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[6] Judge Friendly did not apply the Eighth Amendment's Cruel and Unusual Punishments Clause to the detainee's claim for two reasons. First, he thought that the Eighth Amendment's protections did not attach until after conviction and sentence. 481 F. 2d, at 1032. This view was confirmed by *Ingraham* v. *Wright*, 430 U. S. 651, 671, n. 40 (1977) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions"). Second, he expressed doubt whether a "spontaneous attack" by a prison guard, done without the authorization of prison officials, fell within the traditional Eighth Amendment definition of "punishments." 481 F. 2d, at 1032. Although Judge Friendly gave no reason for not analyzing the detainee's claim under the Fourth Amendment's prohibition against "unreasonable . . . seizures" of the person, his refusal to do so was apparently based on a belief that the protections of the Fourth Amendment did not extend to pretrial detainees. See *id.*, at 1033 (noting that "most of the courts faced with challenges to the conditions of *pretrial* detention have primarily based their analysis directly on the due process clause"). See n. 10, *infra*.

In the years following *Johnson* v. *Glick*, the vast majority of lower federal courts have applied its four-part "substantive due process" test indiscriminately to all excessive force claims lodged against law enforcement and prison officials under § 1983, without considering whether the particular application of force might implicate a more specific constitutional right governed by a different standard.[7] Indeed, many courts have seemed to assume, as did the courts below in this case, that there is a generic "right" to be free from excessive force, grounded not in any particular constitutional provision but rather in "basic principles of § 1983 jurisprudence."[8]

We reject this notion that all excessive force claims brought under § 1983 are governed by a single generic standard. As we have said many times, § 1983 "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred." *Baker* v. *McCollan*, 443 U. S. 137, 144, n. 3 (1979). In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. See *id.*, at 140 ("The first inquiry in any § 1983 suit" is "to isolate the precise constitutional violation with which [the defendant] is charged").[9] In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct. The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized "excessive force" standard. See *Tennessee* v. *Garner*, *supra*, at 7–22 (claim of excessive force to effect arrest analyzed under a Fourth Amendment standard); *Whitley* v. *Albers*, 475 U. S. 312, 318–326 (1986) (claim of excessive force to subdue convicted prisoner analyzed under an Eighth Amendment standard).

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[7] See Freyermuth, Rethinking Excessive Force, 1987 Duke L. J. 692, 694–696, and nn. 16–23 (1987) (collecting cases).

[8] See *Justice* v. *Dennis*, *supra*, at 382 ("There are . . . certain basic principles in section 1983 jurisprudence as it relates to claims of excessive force that are beyond question [,] [w]hether the factual circumstances involve an arrestee, a pretrial detainee or a prisoner").

Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons . . . against unreasonable . . . seizures" of the person. This much is clear from our decision in *Tennessee* v. *Garner*, *supra*. In *Garner*, we addressed a claim that the use of deadly force to apprehend a fleeing suspect who did not appear to be armed or otherwise dangerous violated the suspect's constitutional rights, notwithstanding the existence of probable cause to arrest.

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[9] The same analysis applies to excessive force claims brought against federal law enforcement and correctional officials under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

Though the complaint alleged violations of both the Fourth Amendment and the Due Process Clause, see 471 U. S., at 5, we analyzed the constitutionality of the challenged application of force solely by reference to the Fourth Amendment's prohibition against unreasonable seizures of the person, holding that the "reasonableness" of a particular seizure depends not only on *when* it is made, but also on *how* it is carried out. *Id.*, at 7–8. Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.[10]

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[10] A "seizure" triggering the Fourth Amendment's protections occurs only when government actors have, "by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen," *Terry* v. *Ohio*, 392 U. S. 1, 19, n. 16 (1968); see *Brower* v. *County of Inyo*, 489 U. S. 593, 596 (1989).

Our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today. It is clear, however, that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment. See *Bell* v. *Wolfish*, 441 U. S. 520, 535–539 (1979). After conviction, the Eighth Amendment "serves as the primary source of substantive protection . . . in cases . . . where the deliberate use of force is challenged as excessive and unjustified." *Whitley* v. *Albers*, 475 U. S., at 327. Any protection that "substantive due process" affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the Eighth Amendment. *Ibid.*

Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests'" against the countervailing governmental interests at stake. *Id.*, at 8, quoting *United States* v. *Place*, 462 U. S. 696, 703 (1983). Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. See *Terry* v. *Ohio*, 392 U. S., at 22–27. Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," *Bell* v. *Wolfish*, 441 U. S. 520, 559 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. See *Tennessee* v. *Garner*, 471 U. S., at 8–9 (the question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure").

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. See *Terry* v. *Ohio*, *supra*, at 20–22. The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, *Hill* v. *California*, 401 U. S. 797 (1971), nor by the mistaken execution of a valid search warrant on the wrong premises, *Maryland* v. *Garrison*, 480 U. S. 79 (1987). With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," *Johnson* v. *Glick*, 481 F. 2d, at 1033, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. See *Scott* v. *United States*, 436 U. S. 128, 137–139 (1978); see also *Terry* v. *Ohio*, *supra*, at 21 (in analyzing the reasonableness of a particular search or seizure, "it is imperative that the facts be judged against an objective standard"). An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional. See *Scott* v. *United States*, *supra*, at 138, citing *United States* v. *Robinson*, 414 U. S. 218 (1973).

Because petitioner's excessive force claim is one arising under the Fourth Amendment, the Court of Appeals erred in analyzing it under the four-part *Johnson* v. *Glick* test. That test, which requires consideration of whether the individual officers acted in "good faith" or "maliciously and sadistically for the very purpose of causing harm," is incompatible with a proper Fourth Amendment analysis. We do not agree with the Court of Appeals' suggestion, see 827 F. 2d, at 948, that the "malicious and sadistic" inquiry is merely another way of describing conduct that is objectively unreasonable under the circumstances. Whatever the empirical correlations between "malicious and sadistic" behavior and objective unreasonableness may be, the fact remains that the "malicious and sadistic" factor puts in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is "unreasonable" under the Fourth Amendment. Nor do we agree with the

Court of Appeals' conclusion, see *id.*, at 948, n. 3, that because the subjective motivations of the individual officers are of central importance in deciding whether force used against a convicted prisoner violates the Eighth Amendment, see *Whitley* v. *Albers*, 475 U. S., at 320–321,[11] it cannot be reversible error to inquire into them in deciding whether force used against a suspect or arrestee violates the Fourth Amendment. Differing standards under the Fourth and Eighth Amendments are hardly surprising: the terms "cruel" and "punishments" clearly suggest some inquiry into subjective state of mind, whereas the term "unreasonable" does not. Moreover, the less protective Eighth Amendment standard applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Ingraham* v. *Wright*, 430 U. S. 651, 671,

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[11] In *Whitley*, we addressed a § 1983 claim brought by a convicted prisoner, who claimed that prison officials had violated his Eighth Amendment rights by shooting him in the knee during a prison riot. We began our Eighth Amendment analysis by reiterating the long-established maxim that an Eighth Amendment violation requires proof of the "'"unnecessary and wanton infliction of pain."'" 475 U. S., at 319, quoting *Ingraham* v. *Wright*, 430 U. S., at 670, in turn quoting *Estelle* v. *Gamble*, 429 U. S. 97, 103 (1976). We went on to say that when prison officials use physical force against an inmate "to restore order in the face of a prison disturbance, . . . the question whether the measure taken inflicted unnecessary and wanton pain . . . *ultimately turns* on 'whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" 475 U. S., at 320–321 (emphasis added), quoting *Johnson* v. *Glick*, 481 F. 2d, at 1033. We also suggested that the other prongs of the *Johnson* v. *Glick* test might be useful in analyzing excessive force claims brought under the Eighth Amendment. 475 U. S., at 321. But we made clear that this was so *not* because Judge Friendly's four-part test is some talismanic formula generally applicable to all excessive force claims, but because its four factors help to focus the central inquiry in the Eighth Amendment context, which is whether the particular use of force amounts to the "unnecessary and wanton infliction of pain." See *id.*, at 320–321. Our endorsement of the *Johnson* v. *Glick* test in *Whitley* thus had no implications beyond the Eighth Amendment context.

n. 40 (1977). The Fourth Amendment inquiry is one of "objective reasonableness" under the circumstances, and subjective concepts like "malice" and "sadism" have no proper place in that inquiry.[12]

Because the Court of Appeals reviewed the District Court's ruling on the motion for directed verdict under an erroneous view of the governing substantive law, its judgment must be vacated and the case remanded to that court for reconsideration of that issue under the proper Fourth Amendment standard.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and concurring in the judgment.

I join the Court's opinion insofar as it rules that the Fourth Amendment is the primary tool for analyzing claims of excessive force in the prearrest context, and I concur in the judgment remanding the case to the Court of Appeals for reconsideration of the evidence under a reasonableness standard. In light of respondents' concession, however, that the pleadings in this case properly may be construed as raising a Fourth Amendment claim, see Brief for Respondents 3, I see no reason for the Court to find it necessary further to reach out to decide that prearrest excessive force claims are to be analyzed under the Fourth Amendment *rather than* under a substantive due process standard. I also see no basis for the Court's suggestion, *ante*, at 395, that our decision in *Tennessee* v. *Garner*, 471 U. S. 1 (1985), implicitly so held. Nowhere in *Garner* is a substantive due process standard for evaluating the use of excessive force in a particular case discussed; there is no suggestion that such a standard was offered as an alternative and rejected.

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[12] Of course, in assessing the credibility of an officer's account of the circumstances that prompted the use of force, a factfinder may consider, along with other factors, evidence that the officer may have harbored ill-will toward the citizen. See *Scott* v. *United States*, 436 U. S. 128, 139, n. 13 (1978). Similarly, the officer's *objective* "good faith"—that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment—may be relevant to the availability of the qualified immunity defense to monetary liability under § 1983. See *Anderson* v. *Creighton*, 483 U. S. 635 (1987). Since no claim of qualified immunity has been raised in this case, however, we express no view on its proper application in excessive force cases that arise under the Fourth Amendment.

In this case, petitioner apparently decided that it was in his best interest to disavow the continued applicability of substantive due process analysis as an alternative basis for recovery in prearrest excessive force cases. See Brief for Petitioner 20. His choice was certainly wise as a matter of litigation strategy in his own case, but does not (indeed, cannot be expected to) serve other potential plaintiffs equally well. It is for that reason that the Court would have done better to leave that question for another day. I expect that the use of force that is not demonstrably unreasonable under the Fourth Amendment only rarely will raise substantive due process concerns. But until I am faced with a case in which that question is squarely raised, and its merits are subjected to adversary presentation, I do not join in foreclosing the use of substantive due process analysis in prearrest cases.

THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. *v.* ABBOTT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87–1344. Argued November 8, 1988—Decided May 15, 1989

Federal Bureau of Prisons regulations generally permit prisoners to receive publications from the "outside," but authorize wardens, pursuant to specified criteria, to reject an incoming publication if it is found "to be detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." Wardens may not reject a publication "solely because its content is religious, philosophical, political, social[,] sexual, or . . . unpopular or repugnant," or establish an excluded list of publications, but must review each issue of a subscription separately. Respondents, a class of inmates and certain publishers, filed suit in the District Court, claiming that the regulations, both on their face and as applied to 46 specifically excluded publications, violated their First Amendment rights under the standard set forth in *Procunier* v. *Martinez*, 416 U. S. 396. The District Court refrained from adopting the *Martinez* standard in favor of an approach more deferential to the judgment of prison authorities, and upheld the regulations without addressing the propriety of the 46 exclusions. The Court of Appeals, however, utilized the *Martinez* standard, found the regulations wanting, and remanded the case for an individualized determination on the constitutionality of the 46 exclusions.

Held:

1. Regulations such as those at issue that affect the sending of publications to prisoners must be analyzed under the standard set forth in *Turner* v. *Safley*, 482 U. S. 78, 89, and are therefore "valid if [they are] reasonably related to legitimate penological interests." Prison officials are due considerable deference in regulating the delicate balance between prison order and security and the legitimate demands of "outsiders" who seek to enter the prison environment. The less deferential standard of *Martinez*—whereby prison regulations authorizing mail censorship must be "generally necessary" to protect one or more legitimate governmental interests—is limited to regulations concerning outgoing personal correspondence from prisoners, regulations which are not centrally concerned with the maintenance of prison order and security. Moreover, *Martinez* is overruled to the extent that it might support the drawing of a categorical distinction between incoming correspondence

from prisoners (to which *Turner* applied its reasonableness standard) and incoming correspondence from nonprisoners. Pp. 407–414.

2. The regulations at issue are facially valid under the *Turner* standard. Their underlying objective of protecting prison security is undoubtedly legitimate and is neutral with regard to the content of the expression regulated. Also, the broad discretion the regulations accord wardens is rationally related to security interests. Furthermore, alternative means of expression remain open to the inmates, since the regulations permit a broad range of publications to be sent, received, and read, even though specific publications are prohibited. Moreover, respondents have established no alternative to the regulations that would accommodate prisoners' constitutional rights at a *de minimis* cost to valid penological interests. Pp. 414–419.

3. The case is remanded for an examination of the validity of the regulations as applied to any of the 46 publications introduced at trial as to which there remains a live controversy. P. 419.

263 U. S. App. D. C. 186, 824 F. 2d 1166, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 420.

Deputy Solicitor General Bryson argued the cause for petitioners. With him on the briefs were *Solicitor General Fried*, *Acting Assistant Attorney General Dennis*, *Robert H. Klonoff*, and *Andrew Levchuk*.

Steven Ney argued the cause for respondents. With him on the brief were *Edward I. Koren*, *Alvin J. Bronstein*, and *Steven R. Shapiro*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Robert A. Butterworth*, Attorney General of Florida, and *Jason Vail*, Assistant Attorney General, and *Robert R. Gates*, Deputy Attorney General of Idaho; and for the State of Missouri et al. by *William L. Webster*, Attorney General of Missouri, and *Kelly Mescher*, Assistant Attorney General, *Steve Clark*, Attorney General of Arkansas, *James T. Jones*, Attorney General of Idaho, and *W. J. Michael Cody*, Attorney General of Tennessee.

Briefs of *amici curiae* urging affirmance were filed for the Association of American Publishers, Inc., et al. by *R. Bruce Rich;* and for the Correctional Association of New York by *John Boston* and *William J. Rold*.

JUSTICE BLACKMUN delivered the opinion of the Court.

I

Regulations promulgated by the Federal Bureau of Prisons broadly permit federal prisoners to receive publications from the "outside," but authorize prison officials to reject incoming publications found to be detrimental to institutional security.[1] For 15 years, respondents, a class of inmates and certain publishers, have claimed that these regulations violate their First Amendment rights under the standard of review enunciated in *Procunier* v. *Martinez*, 416 U. S. 396 (1974).[2] They mount a facial challenge to the regulations as well as a challenge to the regulations as applied to 46 specific publications excluded by the Bureau.

After a 10-day bench trial, the District Court refrained from adopting the *Martinez* standard. Instead, it favored an approach more deferential to the judgment of prison authorities and upheld the regulations without addressing the propriety of the 46 specific exclusions. App. to Pet. for Cert. 26a, 43a–47a. The Court of Appeals, on the other hand, utilized the *Martinez* standard, found the regulations wanting, and remanded the case to the District Court for an individualized determination of the constitutionality of the 46 exclusions. *Abbott* v. *Meese*, 263 U. S. App. D. C. 186, 824 F. 2d 1166 (1987).

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[1] As explained in the text, rejection of a publication is authorized "only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." 28 CFR § 540.71(b) (1988). References in the text to "prison security" are intended, for the sake of convenience, to refer more broadly to this range of concerns.

[2] This lawsuit was filed by prisoners in May 1973 and was certified the following year as a class action. In 1978, three publishers, The Prisoners' Union, Weekly Guardian Associates, and The Revolutionary Socialist League, were added as party plaintiffs. The suit also challenged several prison practices, largely concerning inmate correspondence, that are not at issue here. Individual claims for damages were severed in 1979. A bench trial on the claims for injunctive relief took place in 1981, and a memorandum opinion and accompanying order were issued by the District Court in September 1984. The Court of Appeals predicated its jurisdiction on 28 U. S. C. § 1292(a)(1) on the ground that the order of the District Court denied respondents injunctive relief. *Abbott* v. *Meese*, 263 U. S. App. D. C. 186, 187–188, 824 F. 2d 1166, 1167–1168 (1987).

Petitioners, officials of the Department of Justice and the Bureau of Prisons, sought certiorari. We granted the writ in order to determine the appropriate standard of review. *Meese* v. *Abbott*, 485 U. S. 1020 (1988).

We now hold that the District Court correctly anticipated that the proper inquiry in this case is whether the regulations are "reasonably related to legitimate penological interests," *Turner* v. *Safley*, 482 U. S. 78, 89 (1987), and we conclude that under this standard the regulations are facially valid. We therefore disagree with the Court of Appeals on the issue of facial validity, but we agree with that court's remand of the case to the District Court for a determination of the validity of the regulations as applied to each of the 46 publications.

II

We are concerned primarily with the regulations set forth at 28 CFR §§ 540.70 and 540.71 (1988), first promulgated in 1979.[3] These generally permit an inmate to subscribe to, or to receive, a publication without prior approval,[4] but authorize the warden to reject a publication in certain circumstances. The warden may reject it "only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity."

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[3] When the complaint was filed in 1973, the Bureau had not yet issued regulations dealing with management of federal inmates. See 43 Fed. Reg. 30574 (1978) (proposed rulemaking); 44 Fed. Reg. 38254 (1979) (final rules). References herein to regulations are to those presently in effect. They are identical to the version considered by the District Court and the Court of Appeals. The current version differs in some respects from the 1979 version, but those differences are not material to our present inquiry.

[4] The term "publication" is defined as "a book (for example, novel, instructional manual), or a single issue of a magazine or newspaper, plus such other materials addressed to a specific inmate as advertising brochures, flyers, and catalogues." 28 CFR § 540.70(a) (1988).

§ 540.71(b). The warden, however, may not reject a publication "solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant." *Ibid.* The regulations contain a nonexhaustive list of criteria which may support rejection of a publication.[5] The warden is prohibited from establishing an excluded list of publications: each issue of a subscription publication is to be reviewed separately. § 540.71(c). The regulatory criteria for rejecting publications have been supplemented by Program Statement No. 5266.5, which provides further guidance on the subject of sexually explicit material.[6]

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[5] Section 540.71(b) reads:

". . . Publications which may be rejected by a Warden include but are not limited to publications which meet one of the following criteria:

"(1) It depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;

"(2) It depicts, encourages, or describes methods of escape from correctional facilities, or contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions;

"(3) It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs;

"(4) It is written in code;

"(5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;

"(6) It encourages or instructs in the commission of criminal activity;

"(7) It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity."

[6] The Program Statement was promulgated on January 2, 1985, in response to a lawsuit brought by the National Gay Task Force. See App. to Pet. for Cert. 30a (opinion of District Court). By ¶ (a) of the statement, a warden may reject the following types of sexually explicit material pursuant to 28 CFR § 540.71(b)(7) (see n. 5, *supra*):

"(1) Homosexual (of the same sex as the institution population).

"(2) Sado-masochistic.

"(3) Bestiality.

"(4) Involving children."

Material in categories (1), (2), and (3) may be admitted if the warden determines it "not to pose a threat at the local institution." ¶ (b)(1). Explicit heterosexual material ordinarily will be admitted. ¶ (b)(2). Other ex-

The regulations provide procedural safeguards for both the recipient and the sender. The warden may designate staff to screen and, where appropriate, to approve incoming publications, but only the warden may reject a publication. § 540.70(b). The warden must advise the inmate promptly in writing of the reasons for the rejection, § 540.71(d), and must provide the publisher or sender with a copy of the rejection letter, § 540.71(e). The notice must refer to "the specific article(s) or material(s) considered objectionable." § 540.71(d). The publisher or sender may obtain an independent review of the warden's rejection decision by a timely writing to the Regional Director of the Bureau. § 540.71(e). An inmate may appeal through the Bureau's Administrative Remedy Procedure. See §§ 542.10 to 542.16.[7] The warden is instructed to permit the inmate to review the rejected material for the purpose of filing an appeal "unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order or discipline of the institution or to encourage or instruct in criminal activity." § 540.71(d).[8]

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plicit material may be admitted if it has scholarly, or general social or literary, value. ¶ (b)(5). Homosexual material that is not sexually explicit is to be admitted; this includes a publication covering the activities of gay-rights groups or gay religious groups, ¶ (b)(3), and literary publications with homosexual themes or references, ¶ (b)(4). See 263 U. S. App. D. C., at 197, 824 F. 2d, at 1177.

[7] Under the Administrative Remedy Procedure, a prisoner who has been unable informally to resolve his difficulty may file a formal written complaint. 28 CFR § 542.13(b) (1988). If the inmate believes he would be adversely affected if the complaint became known at the prison, he may file the complaint with the Regional Director of the Bureau. § 542.13(c). The warden or Regional Director is to respond within 15 or 30 days, respectively. § 542.14. An adverse decision by the Regional Director may be appealed to the General Counsel of the Bureau; an adverse decision by the warden may be appealed to the Regional Director. § 542.15.

[8] Although the regulations do not so provide, it is the practice of the Bureau to withhold in its entirety any publication containing excludable

III

There is little doubt that the kind of censorship just described would raise grave First Amendment concerns outside the prison context. It is equally certain that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner* v. *Safley*, 482 U. S., at 84, nor do they bar free citizens from exercising their own constitutional rights by reaching out to those on the "inside," *id.*, at 94–99; *Bell* v. *Wolfish*, 441 U. S. 520 (1979); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119 (1977); *Pell* v. *Procunier*, 417 U. S. 817 (1974). We have recognized, however, that these rights must be exercised with due regard for the "inordinately difficult undertaking" that is modern prison administration. *Turner* v. *Safley*, 482 U. S., at 85.

In particular, we have been sensitive to the delicate balance that prison administrators must strike between the order and security of the internal prison environment and the legitimate demands of those on the "outside" who seek to enter that environment, in person or through the written word. Many categories of noninmates seek access to prisons. Access is essential to lawyers and legal assistants representing prisoner clients, see *Procunier* v. *Martinez*, 416 U. S. 396 (1974), to journalists seeking information about prison conditions, see *Pell* v. *Procunier*, *supra*, and to families and friends of prisoners who seek to sustain relationships with them, see *Procunier* v. *Martinez*, *supra*. All these claims to prison access undoubtedly are legitimate; yet prison officials may well conclude that certain proposed interactions, though seemingly innocuous to laymen, have potentially significant implications for the order and security of the prison. Acknowledging the expertise of these officials and that the judiciary is "ill equipped" to deal with the difficult

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material. This practice, referred to by the parties as the "all-or-nothing rule," is also at issue in this case.

and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world. *Id.*, at 404–405.

In this case, there is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners. The question here, as it has been in our previous First Amendment cases in this area, is what standard of review this Court should apply to prison regulations limiting that access.

Martinez was our first significant decision regarding First Amendment rights in the prison context. There, the Court struck down California regulations concerning personal correspondence between inmates and noninmates, regulations that provided for censorship of letters that "unduly complain," "magnify grievances," or "expres[s] inflammatory political, racial, religious or other views or beliefs." *Id.*, at 399. We reviewed these regulations under the following standard:

> "First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials . . . must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad." *Id.*, at 413–414.

It is clear from this language, however, that we did not deprive prison officials of the degree of discretion necessary to vindicate "the particular governmental interest involved." Accordingly, we said:

> "Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty. But any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more . . . legitimate governmental interests." *Id.*, at 414.

The Court's subsequent decisions regarding First Amendment rights in the prison context, however, laid down a different standard of review from that articulated in *Martinez*. As recently explained in *Turner*, these later decisions, which we characterized as involving "prisoners' rights," adopted a standard of review that focuses on the reasonableness of prison regulations: the relevant inquiry is whether the actions of prison officials were "reasonably related to legitimate penological interests." 482 U. S., at 89. The Court ruled that "such a standard is necessary if 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.'" *Ibid.*, quoting *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S., at 128. The Court set forth in *Turner* the development of this reasonableness standard in the respective decisions in *Pell* and *Jones* and in *Block* v. *Rutherford*, 468 U. S. 576 (1984), and we need not repeat that discussion here.

The Court's decision to apply a reasonableness standard in these cases rather than *Martinez*' less deferential approach stemmed from its concern that language in *Martinez* might be too readily understood as establishing a standard of "strict" or "heightened" scrutiny, and that such a strict standard simply was not appropriate for consideration of regulations that are centrally concerned with the maintenance of order and security within prisons.[9] See *Turner* v. *Safley*, 482 U. S., at 81, 87, 89. Specifically, the Court declined to apply the *Martinez* standard in "prisoners' rights" cases because, as was noted in *Turner*, *Martinez* could be (and had been) read to require a strict "least restrictive alternative" analysis, without sufficient sensitivity to the need for discretion in meeting legitimate prison needs. 482 U. S., at 89–90. The Court expressed concern that "every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand," *id.*, at 89, and rejected the costs of a "least restrictive alternative" rule as too high. *Id.*, at 90. See also *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 350 (1987) (refusing to apply a least restrictive alternative standard for regulation of prisoner work rules having an impact on religious observance).

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[9] We do not think it sufficient to focus, as respondents urge, on the identity of the individuals whose rights allegedly have been infringed. Although the Court took special note in *Procunier* v. *Martinez*, 416 U. S. 396 (1974), of the fact that the rights of nonprisoners were at issue, and stated a rule in *Turner* v. *Safley*, 482 U. S. 78 (1987), for circumstances in which "a prison regulation impinges on *inmates'* constitutional rights," *id.*, at 89 (emphasis added), any attempt to forge separate standards for cases implicating the rights of outsiders is out of step with the intervening decisions in *Pell* v. *Procunier*, 417 U. S. 817 (1974); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119 (1977); and *Bell* v. *Wolfish*, 441 U. S. 520 (1979). These three cases, on which the Court expressly relied in *Turner* when it announced the reasonableness standard for "inmates' constitutional rights" cases, all involved regulations that affected rights of prisoners *and* outsiders.

Pell involved the right of representatives of the news media to conduct interviews in the prisons in order to inform the public about prison conditions. The asserted right at issue in *Jones* was the right of a prisoners' union to send its literature into the prison. In *Wolfish*, publishers sought to send hardback books into the prison. In all these cases, regulations worked a "consequential restriction on the . . . rights of those who are not prisoners." *Martinez*, 416 U. S., at 409. But the Court in *Turner* observed: "In none of these . . . cases did the Court apply a standard of heightened scrutiny, but instead inquired whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns." 482 U. S., at 87.

We do not believe that *Martinez* should, or need, be read as subjecting the decisions of prison officials to a strict "least restrictive means" test. As noted, *Martinez* required no more than that a challenged regulation be "generally necessary" to a legitimate governmental interest. 416 U. S., at 414. Certainly, *Martinez* required a close fit between the challenged regulation and the interest it purported to serve. But a careful reading of *Martinez* suggests that our rejection of the regulation at issue resulted not from a least restrictive means requirement, but from our recognition that the regulated activity centrally at issue in that case—outgoing personal correspondence from prisoners—did not, by its very nature, pose a serious threat to prison order and security.[10] We pointed out in *Martinez* that outgoing correspondence that magnifies grievances or contains inflammatory racial views cannot reasonably be expected to present a danger to the community *inside* the prison. *Id.*, at 416. In addition, the implications for security are far more predictable. Dangerous outgoing correspondence is more likely to fall within readily identifiable categories: examples noted in *Martinez* include escape plans, plans relating to ongoing criminal activity, and threats of blackmail or extortion. *Id.*, at 412–413. Although we were careful in *Martinez* not to limit unduly the discretion of prison officials to reject even outgoing letters, we concluded that the regulations at issue were broader than "generally necessary" to protect the interests at stake. *Id.*, at 414.[11]

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[10] *Martinez* has been characterized in subsequent decisions of this Court as a case concerning "written communication by inmates" to noninmate recipients. See *Pell*, 417 U. S., at 826. See also *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 12 (1978) (plurality opinion) (distinguishing *Martinez* as dealing with outsiders' right to *receive* communications from inside the prison, as opposed to outsiders' right to prison access); *id.*, at 31 (dissenting opinion) (noting *Martinez* as a case concerning "excessive censorship of *outgoing* inmate correspondence" (emphasis added)). Indeed, the parties in *Martinez* stressed that the regulation as enforced dealt "with thoughts expressed in prisoner mail to relatives or friends—*mainly outgoing letters, not matters circulated within the walls.*" (Emphasis added.) Brief for Appellees in *Procunier* v. *Martinez*, O. T. 1973, No. 72–1465, p. 29. See also *id.*, at 31; Tr. of Oral Arg. in *Martinez*, pp. 17, 25 ("[T]he issues in this case involve what the prisoners are writing outside of the prison"), 31.

In light of these considerations, it is understandable that the Court in *Martinez* concluded that the regulations there at issue swept too broadly. Where, as in *Martinez*, the nature of the asserted governmental interest is such as to require a lesser degree of case-by-case discretion, a closer fit between the regulation and the purpose it serves may safely be required. Categorically different considerations—considerations far more typical of the problems of prison administration—apply to the case presently before this Court.

We deal here with incoming publications, material requested by an individual inmate but targeted to a general audience. Once in the prison, material of this kind reasonably may be expected to circulate among prisoners, with the concomitant potential for coordinated disruptive conduct. Furthermore, prisoners may observe particular material in the possession of a fellow prisoner, draw inferences about their fellow's beliefs, sexual orientation, or gang affiliations from that material, and cause disorder by acting accordingly. See App. 22–23, 52, 59, 88; see generally Prisoners and the Law 3–14 (I. Robbins ed. 1988) (noting that possession of homosexually explicit material may identify the possessor as homosexual and target him for assault). As the Deputy Solicitor General noted at oral argument: "The problem is not . . . in the individual reading the materials in most cases. The problem is in the material getting into the prison." Tr. of Oral Arg. 10. See also *id.*, at 26; App. 10. In the volatile prison environment, it is essential that prison officials be given broad discretion to prevent such disorder.

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[11] To be sure, some of the regulations at issue in *Martinez* applied to *incoming*, as well as outgoing, correspondence. In striking down these regulations as facially overbroad, the Court did not limit its holding to restrictions on outgoing correspondence. But the Court noted that the regulation banning transmission of "inflammatory political, racial, religious or other views" was not "limited to incoming letters." 416 U. S., at 416. This observation suggests that the Court's approach to the regulation might have been different had the regulation been so limited.

In *Turner*, we dealt with incoming personal correspondence from prisoners; the impact of the correspondence on the internal environment of the prison was of great concern. There, we recognized that *Martinez* was too readily understood as failing to afford prison officials sufficient discretion to protect prison security. In light of these same concerns, we now hold that regulations affecting the sending of a "publication" (see the regulations' specific definition of this word, n. 4, *supra*) to a prisoner must be analyzed under the *Turner* reasonableness standard. Such regulations are "valid if [they are] reasonably related to legitimate penological interests." *Turner*, 482 U. S., at 89.

Furthermore, we acknowledge today that the logic of our analyses in *Martinez* and *Turner* requires that *Martinez* be limited to regulations concerning outgoing correspondence. As we have observed, outgoing correspondence was the central focus of our opinion in *Martinez*. The implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials. Any attempt to justify a similar categorical distinction between incoming correspondence from prisoners (to which we applied a reasonableness standard in *Turner*) and incoming correspondence from nonprisoners would likely prove futile, and we do not invite it. To the extent that *Martinez* itself suggests such a distinction, we today overrule that case; the Court accomplished much of this step when it decided *Turner*.

In so doing, we recognize that it might have been possible to apply a reasonableness standard to all incoming materials without overruling *Martinez:* we instead could have made clear that *Martinez* does not uniformly require the application of a "least restrictive alternative" analysis. We choose not to go that route, however, for we prefer the express flexibility of the *Turner* reasonableness standard. We adopt the *Turner* standard in this case with confidence that, as petitioners here have asserted, "a reasonableness standard is not toothless." Pet. for Cert. 17, n. 10.

IV

The Court in *Turner* identified several factors that are relevant to, and that serve to channel, the reasonableness inquiry.

The first *Turner* factor is multifold: we must determine whether the governmental objective underlying the regulations at issue is legitimate and neutral, and that the regulations are rationally related to that objective. We agree with the District Court that this requirement has been met.[12]

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[12] The District Court in the present case stated its standard of review: "the Bureau [must] articulate a relationship between its regulations (and practices) and legitimate penological objectives such as internal security. Once the Bureau meets that requirement, the plaintiffs must show by 'substantial evidence' that the defendants have 'exaggerated their response' to the problems the regulations address." App. to Pet. for Cert. 46a–47a (citing, among other cases, *St. Claire* v. *Cuyler*, 634 F. 2d 109, 114 (CA3 1980)). The District Court did not have the benefit of this Court's decision in *Turner*, and the standard of review it applied is not precisely identical to the *Turner* standard. In particular, it is by no means certain what the District Court meant by "substantial evidence." We do not pass on any question of evidentiary burdens or burden shifting here, but we conclude that the standard applied by the District Court is sufficiently close to the *Turner* standard for present purposes to permit reliance on the District Court's findings.

The legitimacy of the Government's purpose in promulgating these regulations is beyond question. The regulations are expressly aimed at protecting prison security, a purpose this Court has said is "central to all other corrections goals." *Pell* v. *Procunier*, 417 U. S., at 823.

As to neutrality, "[w]e have found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." *Turner*, 482 U. S., at 90. The ban on *all* correspondence between certain classes of inmates at issue in *Turner* clearly met this "neutrality" criterion, as did the restrictions at issue in *Pell* and *Wolfish*. The issue, however, in this case is closer.

On their face, the regulations distinguish between rejection of a publication "solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant" (prohibited) and rejection because the publication is detrimental to security (permitted). 28 CFR § 540.71(b)(1988). Both determinations turn, to some extent, on content. But the Court's reference to "neutrality" in *Turner* was intended to go no further than its requirement in *Martinez* that "the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression." 416 U. S., at 413.[13] Where, as here, prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are "neutral" in the technical sense in which we meant and used that term in *Turner*.[14]

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[13] Indeed, the Court upheld content distinctions in *Jones*, where internal distribution of a prisoners' union's materials was prohibited while distribution of materials from the Jaycees and Alcoholics Anonymous was permitted. 433 U. S., at 131, n. 8. It upheld these distinctions against an equal protection challenge because the distinctions had a rational basis in the legitimate penological interests of the prisons: in contrast with the prisoners' union, the Jaycees and Alcoholics Anonymous "were seen as serving a rehabilitative purpose, working in harmony with the goals and desires of the prison administrators, and both had been determined not to pose any threat to the order or security of the institution." *Id.*, at 134.

We also conclude that the broad discretion accorded prison wardens by the regulations here at issue is rationally related to security interests. We reach this conclusion for two reasons. The first has to do with the kind of security risk presented by incoming publications. This has been explored above in Part III. The District Court properly found that publications can present a security threat, and that a more closely tailored standard "could result in admission of publications which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder." App. to Pet. for Cert. 32a. Where the regulations at issue concern the entry of materials into the prison, we agree with the District Court that a regulation which gives prison authorities broad discretion is appropriate.

Second, we are comforted by the individualized nature of the determinations required by the regulation. Under the regulations, no publication may be excluded unless the warden himself makes the determination that it is "detrimental to the security, good order, or discipline of the institution or . . . might facilitate criminal activity." 28 CFR §§ 540.70(b), 540.71(b) (1988). This is the controlling standard. A publication which fits within one of the "criteria" for exclusion *may* be rejected, but only if it is determined to meet that standard under the conditions prevailing at the institution at the time. Indeed, the regulations expressly reject certain shortcuts that would lead to needless exclusions. See § 540.70(b) (nondelegability of power to reject publications); § 540.71(c) (prohibition against establishing an excluded list of publications). We agree that it is rational for the Bureau to exclude materials that, although not necessarily "likely" to lead to violence, are determined by the warden to create an intolerable risk of disorder under the conditions of a particular prison at a particular time.[15]

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[14] In contrast, the censorship at issue in *Martinez* closely resembled the kind of censorship which is expressly *prohibited* by the regulations presently at issue. In *Martinez*, the regulations barred writings that "unduly complain" or "magnify grievances," express "inflammatory political, racial, religious or other views," or are "defamatory" or "otherwise inappropriate." 416 U. S, at 415. We found in *Martinez* that "[t]hese regulations fairly invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship," and that the purpose of the regulations had not been found "unrelated to the suppression of expression." *Ibid.* The regulations at issue in *Martinez*, therefore, were decidedly not "neutral" in the relevant sense.

A second factor the Court in *Turner* held to be "relevant in determining the reasonableness of a prison restriction . . . is whether there are alternative means of exercising the right that remain open to prison inmates." 482 U. S., at 90. As has already been made clear in *Turner* and *O'Lone*, "the right" in question must be viewed sensibly and expansively. The Court in *Turner* did not require that prisoners be afforded other means of communicating with inmates at other institutions, 482 U. S., at 92, nor did it in *O'Lone* require that there be alternative means of attending the Jumu'ah religious ceremony, 482 U. S., at 351. Rather, it held in *Turner* that it was sufficient if other means of expression (not necessarily other means of communicating with inmates in other prisons) remained available, and in *O'Lone* if prisoners were permitted to participate in other Muslim religious ceremonies. As the regulations at issue in the present case permit a broad range of publications to be sent, received, and read, this factor is clearly satisfied.

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[15] The exercise of discretion called for by these regulations may produce seeming "inconsistencies," but what may appear to be inconsistent results are not necessarily signs of arbitrariness or irrationality. Given the likely variability within and between institutions over time, see App. to Pet. for Cert. 32a; App. 20–21, 50, greater consistency might be attainable only at the cost of a more broadly restrictive rule against admission of incoming publications. Cf. F. Dostoyevsky, The House of the Dead 40 (Penguin 1985) (prisoners permitted to read only the Bible). Any attempt to achieve greater consistency by broader exclusions might itself run afoul of the second *Turner* factor, *i. e.*, the presence or absence of "alternative means of exercising the right" in question. 482 U. S., at 90. The regulations at issue here, in our view, strike an acceptable balance.

Respondents have argued that the record does not support the conclusion that exclusions are in fact based on particular events or conditions at a particular prison; they contend that variability in enforcement of the regulations stems solely from the censors' subjective views. Brief for Respondents 43–44, n. 37. These contentions go to the adequacy of the regulations as applied, and will be considered on remand.

The third factor to be addressed under the *Turner* analysis is the impact that accommodation of the asserted constitutional right will have on others (guards and inmates) in the prison. 482 U. S., at 90. Here, the class of publications to be excluded is limited to those found potentially detrimental to order and security; the likelihood that such material will circulate within the prison raises the prospect of precisely the kind of "ripple effect" with which the Court in *Turner* was concerned. Where, as here, the right in question "can be exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike," *id.*, at 92, the courts should defer to the "informed discretion of corrections officials," *id.*, at 90.

Finally, *Turner* held: "[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns. . . . But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." 482 U. S., at 90–91. We agree with the District Court that these regulations, on their face, are not an "exaggerated response" to the problem at hand: no obvious, easy alternative has been established.

Regarding the all-or-nothing rule, we analyze respondents' proposed alternatives to that rule as alternative means of accommodating respondents' asserted rights. The District Court discussed the evidence and found, on the basis of testimony in the record, that petitioners' fear that tearing out the rejected portions and admitting the rest of the publication would create more discontent than the current practice was "reasonably founded." App. to Pet. for Cert. 34a. The Court of Appeals did not contest the District Court's factual finding as such, but ruled that upholding a practice merely because it is based upon "reasonably founded" fears is improper under *Martinez:* the Court of Appeals held that this finding "conflicts with the holding of *Martinez* that prison administrators have the burden of showing that a restrictive practice is 'generally necessary.'" 263 U. S. App. D. C., at 194, 824 F. 2d, at 1174.

As we here do not apply the *Martinez* standard, we reject the Court of Appeals' sole ground for questioning the District Court's findings in this respect. In our view, when prison officials are able to demonstrate that they have rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm, they succeed in demonstrating that the alternative they in fact selected was not an "exaggerated response" under *Turner*. Furthermore, the administrative inconvenience of this proposed alternative is also a factor to be considered and adds additional support to the District Court's conclusion that petitioners were not obligated to adopt it. See *Wolfish*, 441 U. S., at 549.

V

In sum, we hold that *Turner*'s reasonableness standard is to be applied to the regulations at issue in this case, and that those regulations are facially valid under that standard. We agree with the remand for an examination of the validity of the regulations as applied to any of the 46 publications introduced at trial as to which there remains a live controversy. See 263 U. S. App. D. C., at 196, 824 F. 2d, at 1176.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and dissenting in part.

An article in Labyrinth, a magazine published by the Committee for Prisoner Humanity & Justice, began as follows:

> "In January 1975, William Lowe, a black prisoner at the United States Penitentiary at Terre Haute, Indiana died of asthma. . . . In August 1975, Joseph (Yusef) Jones, Jr., a black prisoner at the U. S. Penitentiary, Terre Haute, IN. died of asthma.
>
> ". . . The prison infirmary at that time had only one respirator[,] known to be inoperative in January 1975 when William Lowe died. It was still broken in August 1975 when Joseph Jones needed it.
>
> "On the day of his death Jones was suffering an acute asthma attack; he was gasping for breath in the stale, hot, humid air in the cell. He requested medical aid of the guards. After several hours of unheeded pleading, accompanied by complaints to the guards from fellow prisoners in the cell block, Jones became frantic. Each breath was painful; each breath brought him closer to suffocation. Finally, guards called the PA (physician's assistant) . . . , who brought with him the broken respirator. Finding the equipment unusable, the PA gave Jones an injection of the tranquilizer, thorazine, to calm him. Treatment with a tranquilizer was unquestionably contraindicated by Jones' medical condition. Twenty minutes later, Jones was dead.
>
> . . . . .
>
> "*Conclusion:* Jones, who was convicted of bank robbery and sentenced to 10 years in prison, was in fact, sentenced to death and was *murdered by neglect.*"[1]

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[1] Medical Murder, 4 Labyrinth 5 (Apr. 1977) (emphasis in original), reprinted in Joint Lodging 18 (J. L.).

The incident described above eventually came to the attention of this Court, which allowed Jones' mother to pursue her civil rights action against prison officials. *Carlson* v. *Green*, 446 U. S. 14 (1980). Clearly the Labyrinth article's report of inadequate medical treatment of federal prisoners raised "a matter that is both newsworthy and of great public importance." *Pell* v. *Procunier*, 417 U. S. 817, 830, n. 7 (1974). As the Court concedes, *ante*, at 407, both publishers and recipients of such criticism ordinarily enjoy the fullest First Amendment protections.[2] See *Pell*, *supra*, at 822; *Martin* v. *Struthers*, 319 U. S. 141, 146–147 (1943).

Yet Labyrinth's efforts to disseminate the article to its subscribers at Marion Federal Penitentiary met Government resistance. Marion officials, acting within Federal Bureau of Prisons (Bureau) regulations,[3] returned the magazine on the ground that "the article entitled 'Medical Murder' would be detrimental to the good order and discipline of this institution . . . . [T]his type of philosophy could guide inmates in this institution into situations which could cause themselves and other inmates problems with the Medical Staff." J. L. 12. Two years after publication a Marion official testified that he believed the article had posed no threat. App. 104. Nonetheless, the District Court below found the suppression of this and 45 other publications "reasonable," and thus sustained the rejections wholesale. App. to Pet. for Cert. 28a–34a, 47a. This Court holds today that such *carte blanche* deference was improper and remands for case-by-case review. I agree with this aspect of the Court's decision. I cannot agree, however, with either its holding that another finding of "reasonableness" will justify censorship or its premature approval of the Bureau's regulations. These latter determinations upset precedent in a headlong rush to strip inmates of all but a vestige of free communication with the world beyond the prison gate.[4]

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[2] This Court has recognized:

"[S]peech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964) (quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964)).

See also *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 50–51 (1988); *Thornhill* v. *Alabama*, 310 U. S. 88, 101–102 (1940).

[3] In part, the regulations state that the "Bureau of Prisons permits an inmate to subscribe to or to receive publications without prior approval . . . ." 28 CFR § 540.70(a) (1988). "The Warden may reject a publication only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." § 540.71(b).

I

This Court first addressed the First Amendment in the prison context in *Procunier* v. *Martinez*, 416 U. S. 396 (1974). Prior lower court treatments had varied: some courts had maintained "a hands-off posture," while others had required "demonstration of a 'compelling state interest' to justify censorship of prisoner mail." *Id.*, at 406. With characteristic wisdom Justice Powell, in his opinion for the Court, rejected both extremes. The difficulties of prison administration, he perceived, make the strict scrutiny that the First Amendment demands in other contexts inappropriate.[5]

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[4] See *Procunier* v. *Martinez*, 416 U. S. 396, 422 (1974) (MARSHALL, J., concurring) ("A prisoner does not shed . . . basic First Amendment rights at the prison gate"). See also *Turner* v. *Safley*, 482 U. S. 78, 84 (1987); *Pell* v. *Procunier*, 417 U. S. 817, 822 (1974); *Coffin* v. *Reichard*, 143 F. 2d 443, 445 (CA6 1944) *(per curiam)*.

[5] "Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Martinez*, 416 U. S., at 404–405.

See, *e. g., First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 786 (1978); *Elrod* v. *Burns*, 427 U. S. 347, 362 (1976) (opinion of BRENNAN, J.); *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) *(per curiam)*. Focusing not on the rights of prisoners, but on the "inextricably meshed" rights of nonprisoners "who have a particularized interest in communicating with them," he wrote that an "undemanding standard of review" could not be squared with the fact "that the First Amendment liberties of free citizens are implicated in censorship of prisoner mail." *Martinez, supra*, at 408, 409. Thus he chose an "intermediate" means of evaluating speech restrictions, 416 U. S., at 407, allowing censorship if it "further[ed] an important or substantial governmental interest unrelated to the suppression of expression," and "the limitation of First Amendment freedoms [was] no greater than [was] necessary or essential," *id.*, at 413. "Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements," Justice Powell stressed. *Ibid.* Censorship might be permitted, however, to ensure "the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners." *Id.*, at 412 (footnote omitted). Prison administrators did not have "to show with certainty that adverse consequences would flow from the failure to censor a particular letter," but "any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more of the legitimate governmental interests identified above." *Id.*, at 414.[6]

In the 15 years since *Martinez* was decided, lower courts routinely have applied its standard to review limitations not only on correspondence between inmates and private citizens, but also on communications—such as the newsletters, magazines, and books at issue—between inmates and publishers.[7] Carefully examining free speech rights and countervailing governmental interests, these courts approved some restrictions and invalidated others.[8] This Court thus correctly recognizes that *Martinez*'s standard of review does not deprive prison officials of the discretion necessary to perform their difficult tasks. *Ante*, at 409. Inexplicably, it then partially overrules *Martinez* by limiting its scope to outgoing mail; letters and publications sent to prisoners now are subject only to review for "reasonableness." *Ante*, at 413–414.

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[6] It is obvious that *Martinez* calls for less than strict scrutiny, and the Court today correctly rejects petitioners' argument to the contrary. Compare *ante*, at 409–411, with Brief for Petitioners 18–22; Reply Brief for Petitioners 1–10.

This peculiar bifurcation of the constitutional standard governing communications between inmates and outsiders is unjustified. The decision in *Martinez* was based on a distinction between prisoners' constitutional rights and the protection the First Amendment affords those who are not prisoners—not between nonprisoners who are senders and those who are receivers. As Justice Powell explained:

> "Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. And this does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter, for

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[7] See, *e. g.*, *Lawson* v. *Dugger*, 840 F. 2d 781 (CA11 1987), reh'g denied, 840 F. 2d 779 (1988) *(per curiam)*, cert. pending, No. 87–1994; *Valiant-Bey* v. *Morris*, 829 F. 2d 1441 (CA8 1987); *Murphy* v. *Missouri Dept. of Corrections*, 814 F. 2d 1252 (CA8 1987); *Pepperling* v. *Crist*, 678 F. 2d 787 (CA9 1982); *Trapnell* v. *Riggsby*, 622 F. 2d 290 (CA7 1980); *Brooks* v. *Seiter*, 779 F. 2d 1177 (CA6 1985); *Guajardo* v. *Estelle*, 580 F. 2d 748 (CA5 1978); *Aikens* v. *Jenkins*, 534 F. 2d 751 (CA7 1976); *Morgan* v. *LaVallee*, 526 F. 2d 221 (CA2 1975).

[8] See, *e. g.*, *Espinoza* v. *Wilson*, 814 F. 2d 1093 (CA6 1987); *Travis* v. *Norris*, 805 F. 2d 806 (CA8 1986); *Meadows* v. *Hopkins*, 713 F. 2d 206, 211 (CA6 1983); *Vodicka* v. *Phelps*, 624 F. 2d 569 (CA5 1980); *Carpenter* v. *South Dakota*, 536 F. 2d 759 (CA8 1976), cert. denied, 431 U. S. 931 (1977).

> the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication. . . . The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him." 416 U. S., at 408–409 (citations omitted).

The Court today abandons *Martinez*'s fundamental premise. In my opinion its suggestion that three later opinions applying reasonableness standards warrant this departure, see *ante*, at 410, n. 9, is disingenuous. Those cases did involve communications between inmates and outsiders; however, as I shall demonstrate, their legal and factual foundations differed critically from those in *Martinez* or in this case.

In *Pell* v. *Procunier*, 417 U. S. 817 (1974), inmates and reporters challenged regulations prohibiting face-to-face media interviews with specific prisoners. *Id.*, at 819. The infringement on prisoners' rights, the Court held, was reasonable because prisoners could write letters to the media—a means of communication less disruptive than the physical entry of reporters into the prison. *Id.*, at 824. The reporters' assertion of a special right of access could not prevail, the Court explained, because the First Amendment does not give the media greater access to public events or institutions—including prisons—than it gives ordinary citizens.[9] *Id.*, at 835. *Pell* in no way diluted the basic distinction articulated in *Martinez*.

Inmates in *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119 (1977), had maintained that First

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[9] The Court drew support for this proposition from *Branzburg* v. *Hayes*, 408 U. S. 665, 684 (1972). That case, like comparable cases decided after *Pell*, arose outside the prison context. *E. g.*, *Herbert* v. *Lando*, 441 U. S. 153, 165 (1979); *Zurcher* v. *Stanford Daily*, 436 U. S. 547, 565–567 (1978).

Amendment associational rights protected their efforts to form a union. The Court concluded that the administrators' grounds for preventing union organizing within the prison—an activity occurring largely among inmates—were reasonable. *Id.*, at 129. It also approved the officials' refusal to deliver bulk packets of union literature to specific inmates for distribution to others. Applying Equal Protection Clause as well as First Amendment standards, the Court held that the restriction was reasonable because it was limited in scope and because the union retained "other avenues of outside informational flow . . . ." *Id.*, at 131; see *id.*, at 133, 136.

In the third case, *Bell* v. *Wolfish*, 441 U. S. 520 (1979), the Court upheld a regulation that allowed only publishers, bookstores, and book clubs to mail hardbound books to pretrial detainees. Hardbacks might serve as containers for contraband, jail administrators argued. Since the risk of improper use by publishers and similar sources was low, the jail delivered books from them but not from other outsiders. *Id.*, at 549. The Court found this explanation acceptable and held that the rule did not violate the detainees' First Amendment rights. *Id.*, at 550. Although the Court did not expressly address the rights of nonprisoners, the fact that softcover publications were delivered without restriction, see *id.*, at 552, minimized the abridgment of outsiders' rights. The approval in *Wolfish* of greater protection for publishers than for individual citizens reinforces *Martinez*'s view that the First Amendment rights of nonprisoners must be carefully weighed and undermines the Court's approach today.

Most recently, *Turner* v. *Safley*, 482 U. S. 78 (1987), confirmed the vitality of *Martinez* for evaluating encroachments on the First Amendment rights of nonprisoners. The Court relied on the three interim "prisoners' rights" cases to establish a reasonableness standard for reviewing inmate-to-inmate correspondence. *Id.*, at 89. But in its unanimous invalidation of a restriction on inmate marriages, the Court acknowledged that "because the regulation may entail a 'consequential restriction on the [constitutional] rights of those who are not prisoners,'" *Martinez* might posit the correct level of review. 482 U. S., at 97 (quoting *Martinez*, 416 U. S., at 409). It did not "reach this question, however, because even under the reasonable relationship test, the marriage regulation does not withstand scrutiny."[10] 482 U. S., at 97.

The *Turner* opinion cited and quoted from *Martinez* more than 20 times; not once did it disapprove *Martinez*'s holding, its standard, or its recognition of a special interest in protecting the First Amendment rights of those who are *not* prisoners. Notwithstanding, today the Court abandons the premise on which *Martinez* was grounded. This casual discarding of "'the secure foundation'" of considered precedent ill serves the orderly development of the law. See *Runyon* v. *McCrary*, 427 U. S. 160, 190–191 (1976) (STEVENS, J., concurring) (quoting B. Cardozo, The Nature of the Judicial Process 149 (1921)).

II

In lieu of *Martinez*'s rationale, which properly takes into consideration the effects that prison regulations have on the First Amendment rights of nonprisoners, the Court applies a manipulable "reasonableness" standard to a set of regulations that too easily may be interpreted to authorize arbitrary rejections of literature addressed to inmates. As I pointed out in my partial dissent in *Turner*, an

> "open-ended 'reasonableness' standard makes it much too easy to uphold restrictions on prisoners' First Amendment rights on the basis of administrative concerns and speculation about possible security risks rather than on the basis of evidence that the restrictions

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[10] Petitioners thus are quite wrong when they contend that *Turner* mandated that First Amendment challenges to prison regulations always be reviewed only for reasonableness. See Brief for Petitioners 18.

> are needed to further an important governmental interest." 482 U. S., at 101, n. 1.

To be sure, courts must give prison administrators some berth to combat the "Herculean obstacles" blocking their efforts to maintain security and prevent escapes or other criminal conduct, see *Martinez*, 416 U. S., at 404, and I do not object to those regulations clearly targeted at such interests.[11] Nevertheless, I agree with the Court of Appeals that provisions allowing prison officials to reject a publication if they find its contents are "detrimental" to "security, good order, or discipline" or "might facilitate criminal activity" are impermissibly ambiguous. See *Abbott* v. *Meese*, 263 U. S. App. D. C. 186, 193, 824 F. 2d 1166, 1173 (1987). The term "detrimental" invites so many interpretations that it scarcely checks administrators' actions. Similarly, "might facilitate" —in contrast with "encourage" or "advocate"—so attenuates the causal connection between expression and proscribed conduct that the warden has virtually free rein to censor incoming publications.

Despite this vagueness, the Court accepts petitioners' assertion that they need "broad discretion" to prevent internal disorder, and thus holds that all the regulations are facially valid. See *ante*, at 416. This premature leap of faith creates a presumption that rejections pursuant to these regulations are "reasonable"—a presumption that makes likely far less judicial protection of publishers' rights than I believe the First Amendment requires. As was JUSTICE BLACKMUN in

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[11] It is undisputed that a warden may exclude an incoming publication if:

"(1) It depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;

"(2) It . . . contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions;

"(3) It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs; [or]

"(4) It is written in code. . . ." 28 CFR § 540.71(b) (1988).

Block v. *Rutherford*, 468 U. S. 576, 593 (1984) (concurring in judgment), I am concerned that the Court today too readily "substitute[s] the rhetoric of judicial deference for meaningful scrutiny of constitutional claims in the prison setting." Cf. *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 358 (1987) (BRENNAN, J., dissenting); *Jones*, 433 U. S., at 142–143 (MARSHALL, J., dissenting).

The feeble protection provided by a "reasonableness" standard applied within the framework of these regulations is apparent in this record.[12] Like the Labyrinth issue, many of the 46 rejected publications criticized prison conditions or otherwise presented viewpoints that prison administrators likely would not welcome.[13] Testimony by one mail clerk[14] and the rote explanations for decisions[15] suggest that rejections were based on personal prejudices or categorical assumptions rather than individual assessments of risk. Cf. *Martinez*, 416 U. S., at 415. These circumstances belie the Court's interpretation of these regulations as "content-neutral" and its assertion that rejection decisions are made individually. See *ante*, at 414–417. Some of the rejected publications may represent the sole medium for conveying and receiving a particular unconventional message; thus it is irrelevant that the regulations permit many other publications to be delivered to prisoners. See *ante*, at 417–418. No evidence supports the Court's assumption that, unlike personal letters, these publications will circulate within the prison and cause ripples of disruption.[16] See *ante*, at 412, 418. Nor is there any evidence that an incoming publication ever caused a disciplinary or security problem; indeed, some of the rejected publications were delivered to inmates in other prisons without incident. See App. 60, 99, 116–117. In sum, the record convinces me that under either the *Martinez* standard or the more deferential "reasonableness" standard these regulations are an impermissibly exaggerated response to security concerns. Cf. *Turner*, 482 U. S., at 89–90.

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[12] Cf. *Turner*, 482 U. S., at 100 (STEVENS, J., concurring in part and dissenting in part) ("How a court describes its standard of review when a prison regulation infringes fundamental constitutional rights often has far less consequence for the inmates than the actual showing that the court demands of the State in order to uphold the regulation").

[13] While publications like Labyrinth reported on prison conditions and legal matters, other rejected publications discussed or depicted sexual activity, martial arts, and electronics, and advocated homosexual rights, neo-Nazism, and left-wing politics. See App. 113–132. See generally J. L.; Respondents' Lodging.

[14] Asked in a deposition to describe her method for reviewing publications, the clerk replied:

"A. I have a standard.

"Q. What is that if you can explain it?

"A. Okay. Sex is a standard. Radical is a standard. I will go out on a limb and say Communism and fascism is a standard I would use. It is more of a political-sexual type standard I personally use. I have not been told.

"Q. You have not been told to use it?

"A. No.

"Q. How did you happen to get it?

. . . . .

"A. By looking at what I see as being excluded, those publications are generally of a sexual political nature. Therefore, I believe that that is the questionable area and they are the ones that I refer." App. 97–98.

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[15] Statements of reasons for returning different publications were identical even in their misspelling. See J. L. 5, 46, 47, 48 ("[T]his publication is used in part to glorify problem inmates and prison unions which could cause problems to inmates and staff in the security and orderly running of this institution. This publication also propagets *[sic]* an adversary attitude by inmates toward staff"); cf. *id.*, at 40 ("[T]his type of material on institutions has a tendency to develop an adversary attitude by inmates toward staff, which can cause an unhealthy environment in this institution").

[16] The Court makes this assumption on the basis of a statement by petitioners at oral argument. See *ante*, at 413 (quoting Tr. of Oral Arg. 10). But each publication at issue was addressed to a single inmate, making this case more analogous to the personal correspondence in *Martinez* than to the bulk mailings in *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119 (1977). The prison regulations in *Martinez* raised the specter of disruptive dissemination as a justification for censorship, 416 U. S., at 399, n. 3; the Court nevertheless found those regulations unconstitutional.

III

If a prison official deems part of a publication's content—even just one page of a book—to present an intolerable security risk, the Bureau's regulations authorize the official to return the entire issue to the publisher. See 28 CFR § 540.71(e) (1988). In their challenge to this all-or-nothing rule, respondents argue that First Amendment interests easily could be accommodated if administrators omitted the objectionable material and forwarded the rest of the publication to the inmate. The District Court, however, found that "defendants' fears" that "such censorship would create more discontent than the current practice" were "reasonably founded." App. to Pet. for Cert. 34a. To the contrary, the Court of Appeals applied the *Martinez* standard and held that "rejection of the balance is not 'generally necessary' to protect the legitimate governmental interest involved in the portion properly rejected." 263 U. S. App. D. C., at 193–194, 824 F. 2d, at 1173–1174.

In this Court petitioners argue that on remand the Court of Appeals should conduct "a detailed analysis of the evidence in this case" to determine if the all-or-nothing rule is "reasonable." Brief for Petitioners 31. "The validity of that policy," they continue, "will depend, among other things, on the security and administrative justifications for that policy, the availability of alternative courses of action, and the costs and risks associated with employing those alternatives." *Ibid.* It is remarkable that after 16 years of litigation petitioners have failed to develop an argument that tells us anything about the assumed security or administrative justification for this rule. Even more remarkable is the Court's conclusion that since it does not apply the *Martinez* standard, it need not examine the appropriateness of the District Court's finding that the rule was reasonable. See *ante*, at 419. A review of the record reveals that the Court thus defers to "findings" of a security threat that even prison officials admitted to be nonexistent.

There is no evidence that delivery of only part of a publication would endanger prison security.[17] Rather, the primary

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[17] I quote, in its entirety, the discussion of the record that preceded the District Court's finding that the all-or-nothing rule was reasonable:

"The plaintiffs offered evidence that a less restrictive policy, at no cost to security, would be to tear out the rejected portions and admit the rest of the publication. But the defendants contend that such censorship would create more discontent than the current practice, and one of the plaintiffs' witnesses agreed.[11]" App. to Pet. for Cert. 34a.

The District Court's footnote cites to the following trial testimony by a witness whom respondents offered as an expert in the field of corrections:

"Q Are you familiar with the policy of the Bureau of Prisons concerning what we call the all-or-nothing rule?

"A As I understand it, if a publication is approved for admission, it may be approved in toto. If it has material in it which is considered offensive[,] it will be entirely excluded regardless of the condition or the tenor of the other items in the publication.

"Q And is there a security justification, in your opinion, for not giving the prisoner the—

"A I can sympathize with the Bureau about any publication which does have material which I would like to exclude. Take, for example, a publication that gave an explicit design of how to produce a Molotov cocktail. I would not like to admit that particular publication into the institution. However, I don't like the idea of just cutting out the offending part of that publication and letting that in. I think that's the compromise which one might make. I don't like it, but I suppose that's the best of the bad solutions which are available.

"Q Do you see any security risk in cutting out the offending portion and giving the unoffending portion to the inmate?

"A If pushed to the wall, I guess I would do that, but as I said earlier in my deposition and as I say now, I don't like that. It smacks of what goes on in fascist countries and is not a very attractive solution to me, but I don't see any way out of it.

"I'd rather do that than exclude the publication entirely just on the basis of one offending passage." Tr. 392–393.

Although this testimony manifests the *expert witness'* discontent with censoring parts of publications, it offers no support for petitioners' arjustification advanced for the all-or-nothing rule was administrative convenience. See App. 41, 68. The Bureau has objected that a contrary rule "would mean defacing the material and laboriously going over each article in each publication. . . ." 44 Fed. Reg. 38258 (1979). But general speculation that some administrative burden might ensue should not be sufficient to justify a meat-ax abridgment of the First Amendment rights of either a free citizen or a prison inmate. It is difficult even to imagine such a burden in this instance: if, as the regulations' text seems to require, prison officials actually read an article before rejecting it, the incremental burden associated with clipping out the offending matter could not be of constitutional significance. The Bureau's administrative convenience justification thus is insufficient as a matter of law under either the *Martinez* standard or a "reasonableness" standard. The District Court's contradictory finding simply highlights the likelihood that an attitude of broad judicial deference, coupled with a "reasonableness"

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gument that *inmate* discontent with the practice would threaten prison security. Indeed petitioners themselves proffered few pieces of supporting evidence, among them this deposition testimony by an official at the Marion Federal Penitentiary:

> "Q. It wouldn't present a security threat, would it, to cut out the page?
>
> "A. No, it would not prevent *[sic]* a security threat to cut out the page if there was nothing else in there.
>
> . . . . .
>
> "Q. And is it then just a question of administrative convenience to the institution? It is easier not to bother with cutting out different pieces, is that right?
>
> "A. Well, I think in dealing with the kind of individual that we deal with here or in any institution, if you start cutting up the magazines, you are going to leave yourself open to all kinds of criticism, remarks and other problems. So it is best to just return the entire publication to the source and then no other insinuations or remarks can be made concerning us and what we do to individual publications or any magazines that people receive." App. 100–101.

See also *id.*, at 41, 68.

standard, will provide inadequate protection for the rights at stake.[18]

For these reasons, I would affirm the judgment of the Court of Appeals.

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[18] Thus I must disagree with petitioners' staunch insistence that the reasonableness standard is not "toothless." See Brief for Petitioners 27. As I suggested in *Turner:*

"[I]f the standard can be satisfied by nothing more than a '*logical* connection' between the regulation and any legitimate penological concern perceived by a cautious warden, it is virtually meaningless. Application of the standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation. Indeed, there is a logical connection between prison discipline and the use of bullwhips on prisoners; and security is logically furthered by a total ban on inmate communication, not only with other inmates but also with outsiders who conceivably might be interested in arranging an attack within the prison or an escape from it." 482 U. S., at 100–101 (concurring in part and dissenting in part) (citation omitted) (emphasis in original).

UNITED STATES *v.* HALPER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 87-1383. Argued January 17, 1989—Decided May 15, 1989

After respondent, the manager of a company which provided medical services for patients eligible for federal Medicare benefits, was convicted, *inter alia*, of submitting 65 false claims for Government reimbursement in violation of the federal criminal false-claims statute, he was sentenced to prison and fined $5,000. Based solely on facts established by his criminal conviction, the District Court then granted the Government summary judgment in its suit against him under the federal civil False Claims Act (Act). Under the strict terms of that Act's remedial provision, as it then existed, respondent would have been liable for a civil penalty of $2,000 on each of the 65 false claims, as well as for twice the amount of the Government's actual damages of $585 and the costs of the action. However, because the statutorily authorized recovery of more than $130,000 bore no "rational relation" to the sum of the Government's actual loss plus its costs in investigating and prosecuting the false claims, which the court approximated at no more than $16,000, the court held that imposition of the full statutory amount would violate the Double Jeopardy Clause of the Fifth Amendment by punishing respondent a second time for the same conduct for which he had been convicted. Since it considered the Act unconstitutional as applied to respondent, the court limited the Government's recovery to double damages and costs. The Government took a direct appeal to this Court.

Held: The statutory penalty authorized by the Act, as applied to respondent, violates the Double Jeopardy Clause. Pp. 440–452.

(a) Although *Helvering* v. *Mitchell*, 303 U. S. 391, *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, and *Rex Trailer Co.* v. *United States*, 350 U. S. 148, establish that proceedings and penalties under the Act are civil in nature, and that a civil remedy does not constitute multiple punishment violative of the Clause merely because Congress provided for civil recovery in excess of the Government's actual damages, those cases did not consider and do not foreclose the possibility that in a particular case a civil penalty authorized by the Act may be so extreme and so divorced from the Government's actual damages and expenses as to constitute prohibited "punishment." Pp. 440–446.

(b) In the rare case such as the present, where a prolific but small-gauge offender previously has sustained a criminal penalty, and the civil penalty sought in a subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, the defendant is entitled to an accounting of the Government's damages and costs in order to allow the trial court, in its discretion, to determine whether the penalty sought in fact constitutes a second punishment violative of the Clause and to set the size of the civil sanction the Government may receive without crossing the line between permissible remedy and prohibited punishment. Pp. 446–451.

(c) While the District Court correctly found that the disparity between its approximation of the Government's costs and respondent's statutory liability is sufficiently disproportionate that the sanction provided by the Act constitutes a second punishment violative of double jeopardy, the case is remanded to permit the Government to demonstrate that that court's assessment of its injuries was erroneous, since it would be unfair to deprive the Government of an opportunity to present an accounting of its actual costs arising from respondent's fraud, to seek an adjustment of the court's approximation, and to recover demonstrated costs. P. 452.

664 F. Supp. 852, vacated and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, *post*, p. 452.

Michael R. Dreeben argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Bolton*, *Deputy Solicitor General Merrill*, *Roy T. Englert, Jr.*, and *Michael Jay Singer*.

John G. Roberts, Jr., by invitation of the Court, 488 U. S. 906, argued the cause and filed a brief as *amicus curiae* in support of the judgment below.

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case, we consider whether and under what circumstances a civil penalty may constitute "punishment" for the purposes of double jeopardy analysis.[1]

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[1] The Double Jeopardy Clause reads:

"[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U. S. Const., Amdt. 5.

I

Respondent Irwin Halper worked as manager of New City Medical Laboratories, Inc., a company which provided medical service in New York City for patients eligible for benefits under the federal Medicare program. In that capacity, Halper submitted to Blue Cross and Blue Shield of Greater New York, a fiscal intermediary for Medicare, 65 separate false claims for reimbursement for service rendered. Specifically, on 65 occasions during 1982 and 1983, Halper mischaracterized the medical service performed by New City, demanding reimbursement at the rate of $12 per claim when the actual service rendered entitled New City to only $3 per claim. Duped by these misrepresentations, Blue Cross overpaid New City a total of $585; Blue Cross passed these overcharges along to the Federal Government.[2]

The Government became aware of Halper's actions and in April 1985 it indicted him on 65 counts of violating the criminal false-claims statute, 18 U. S. C. §287, which prohibits "mak[ing] or present[ing] . . . any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent." Halper was convicted on all 65 counts, as well as on 16 counts of mail fraud. He was sentenced in July 1985 to imprisonment for two years and fined $5,000.

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[2] The underlying details of Halper's fraud are of little importance with respect to his double jeopardy claim. In brief, providers such as New City bill for their service according to designated code numbers corresponding to the medical service provided. Code "9018" was the number for seeking reimbursement for service performed for the first or only patient seen at a private home or Skilled Nursing Facility the provider was required to visit. Code "9019" was the number for seeking reimbursement for service performed for each additional patient seen at the facility. At all relevant times, the allowable reimbursement for service under code "9018" was either $10 or $12. The allowable reimbursement under code "9019" was $3. Halper submitted 65 claims falsely seeking reimbursement under code "9018" for service properly reimbursable under the lower priced code "9019." See 660 F. Supp. 531, 532 (SDNY 1987).

The Government then brought the present action in the United States District Court for the Southern District of New York against Halper and another, who later was dismissed from the case, see App. 21, 36, under the civil False Claims Act, 31 U. S. C. §§3729–3731. That Act was violated when "[a] person not a member of an armed force of the United States . . . (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved." §3729. Based on facts established by Halper's criminal conviction and incorporated in the civil suit, the District Court granted summary judgment for the Government on the issue of liability. 660 F. Supp. 531, 532–533 (1987).

The court then turned its attention to the remedy for Halper's multiple violations. The remedial provision of the Act stated that a person in violation is "liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action." 31 U. S. C. §3729 (1982 ed., Supp. II).[3] Having violated the Act 65 separate times, Halper thus appeared to be subject to a statutory penalty of more than $130,000.

The District Court, however, concluded that in light of Halper's previous criminal punishment, an additional penalty this large would violate the Double Jeopardy Clause. Although the court recognized that the statutory provisions for a civil sanction of $2,000 plus double damages for a claims violation was not in itself criminal punishment, it concluded that this civil remedy, designed to make the Government whole, would constitute a second punishment for double jeopardy analysis if, in application, the amount of the penalty was "entirely unrelated" to the actual damages suffered and the expenses incurred by the Government. 660 F. Supp., at 533. In the District Court's view, the authorized recovery of more than $130,000 bore no "rational relation" to the sum of the Government's $585 actual loss plus its costs in investigating and prosecuting Halper's false claims. *Ibid.* The court therefore ruled that imposition of the full amount would violate the Double Jeopardy Clause by punishing Halper a second time for the same conduct. To avoid this constitutional proscription, the District Court read the $2,000-per-count statutory penalty as discretionary and, approximating the amount required to make the Government whole, imposed the full sanction for only 8 of the 65 counts. The court entered summary judgment for the Government in the amount of $16,000. *Id.*, at 534.

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[3] The Act was amended by the False Claims Amendments Act of 1986, Pub. L. 99–562, 100 Stat. 3153, to increase the civil penalty to "not less than $5,000 and not more than $10,000 plus 3 times the amount of damages which the Government sustains because of the act of that person," and "the costs of a civil action brought to recover any such penalty or damages." 31 U. S. C. §3729(a)(7) (1982 ed., Supp. V).

The United States, pursuant to Federal Rule of Civil Procedure 59(e), moved for reconsideration. The motion was granted. On reconsideration, the court confessed error in ruling that the $2,000 penalty was not mandatory for each count. 664 F. Supp. 852, 853–854 (1987). It remained firm, however, in its conclusion that the $130,000 penalty could not be imposed because, in the circumstances before it, that amount would violate the Double Jeopardy Clause's prohibition of multiple punishments. *Ibid.* Looking to *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537 (1943), for guidance, the court concluded that, although a penalty that is more than the precise amount of actual damages is not necessarily punishment, a penalty becomes punishment when, quoting Justice Frankfurter's concurrence in *Hess*, *id.*, at 554, it exceeds what "'could reasonably be regarded as the equivalent of compensation for the Government's loss.'" 664 F. Supp., at 854. Applying this principle, the District Court concluded that the statutorily authorized penalty of $130,000, an amount more than 220 times greater than the Government's measurable loss, qualified as punishment which, in view of Halper's previous criminal conviction and sentence, was barred by the Double Jeopardy Clause. Because it considered the Act unconstitutional as applied to Halper, the District Court amended its judgment to limit the Government's recovery to double damages of $1,170 and the costs of the civil action. *Id.*, at 855.

The United States, pursuant to 28 U. S. C. § 1252, took a direct appeal to this Court. We noted probable jurisdiction, 486 U. S. 1053 (1988), in order to determine the constitutionality of the remedial provisions of the civil False Claims Act as applied in Halper's case.

II

This Court many times has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. See, *e. g.*, *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969). The third of these protections—the one at issue here—has deep roots in our history and jurisprudence. As early as 1641, the Colony of Massachusetts in its "Body of Liberties" stated: "No man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse." American Historical Documents 1000–1904, 43 Harvard Classics 66, 72 (C. Eliot ed. 1910). In drafting his initial version of what came to be our Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 Annals of Cong. 434 (1789–1791) (J. Gales ed. 1834). In our case law, too, this Court, over a century ago, observed: "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence." *Ex parte Lange*, 18 Wall. 163, 168 (1874).

The multiple-punishment issue before us is narrowly framed by the common understandings of the parties to this case. They do not dispute that respondent Halper already has been punished as a result of his prior criminal proceeding when he was sentenced to a jail term and fined $5,000. Nor do they dispute that the instant proceeding and the prior criminal proceeding concern the same conduct, the submission of 65 false claims.[4] The sole question here is whether the statutory penalty authorized by the civil False Claims Act, under which Halper is subject to liability of $130,000 for false claims amounting to $585, constitutes a second "punishment" for the purpose of double jeopardy analysis.

The Government argues that in three previous cases, *Helvering* v. *Mitchell*, 303 U. S. 391 (1938), *United States ex rel. Marcus* v. *Hess*, *supra*, and *Rex Trailer Co.* v. *United States*, 350 U. S. 148 (1956), this Court foreclosed any argument that a penalty assessed in a civil proceeding, and specifically in a civil False Claims Act proceeding, may give rise to double jeopardy. Specifically, the Government asserts that these cases establish three principles: first, that the Double Jeopardy Clause's prohibition against multiple punishment protects against only a second criminal penalty; second, that criminal penalties are imposed only in criminal proceedings; and, third, that proceedings under, and penalties authorized by, the civil False Claims Act are civil in nature. In addition, the Government argues on the basis of these three cases and others, see, *e. g.*, *United States* v. *Ward*, 448 U. S. 242 (1980), that whether a proceeding or penalty is civil or criminal is a matter of statutory construction, and that Congress clearly intended the proceedings and penalty at issue here to be civil in nature.

The Government, in our view, has misconstrued somewhat the nature of the multiple-punishment inquiry, and, in so doing, has overread the holdings of our precedents. Although, taken together, these cases establish that proceedings and penalties under the civil False Claims Act are indeed civil in nature, and that a civil remedy does not rise to the level of "punishment" merely because Congress provided for civil recovery in excess of the Government's actual damages, they do not foreclose the possibility that in a particular case a civil penalty authorized by the Act may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment.

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[4] Indeed, as has been noted, the District Court found Halper liable strictly on the basis of the facts established in the criminal proceeding.

In *Mitchell*, the Commissioner of Internal Revenue determined that the taxpayer fraudulently had asserted large sums as deductions on his 1929 income tax return. Mitchell was indicted and prosecuted for willful evasion of taxes. At trial, however, he was acquitted. The Government then brought an action to collect a deficiency of $728,709.84 in Mitchell's tax and, as well, a 50% additional amount specified by statute on account of the fraud. Mitchell argued that this second action subjected him to double jeopardy because the 50% addition was intended as punishment, and that the supposedly civil assessment proceeding therefore was actually a second criminal proceeding based on a single course of conduct.

This Court did not agree. The Double Jeopardy Clause, it noted, "prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." 303 U. S., at 399. Because Mitchell was acquitted (and therefore not punished) in his criminal prosecution, the Court was called upon to determine only whether the statute imposed a criminal sanction—in which case the deficiency proceeding would be an unconstitutional second attempt to punish criminally. Whether the statutory sanction was criminal in nature, the Court held, was a question of statutory interpretation; and, applying traditional canons of construction, the Court had little difficulty concluding that Congress intended that the statute impose a civil penalty and that the deficiency sanction was in fact remedial, providing reimbursement to the Government for investigatory and other costs of the taxpayer's fraud. *Id.*, at 398–405. Since "in the civil enforcement of a remedial sanction there can be no double jeopardy," *id.*, at 404, the Court rejected Mitchell's claim.

Mitchell at most is of tangential significance for our current inquiry. While the opinion makes clear that the Government may impose both a criminal and a civil sanction with respect to the same act or omission, and that whether a given sanction is criminal is a matter of statutory construction, it simply does not address the question we face today: whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes "punishment" for the purpose of double jeopardy analysis. If anything, Justice Brandeis' carefully crafted opinion for the Court intimates that a civil sanction may constitute punishment under some circumstances. As noted above, the Court distinguished between the Double Jeopardy Clause's prohibition against "attempting a second time to punish criminally" and its prohibition against "merely punishing twice." *Id.*, at 399. The omission of the qualifying adverb "criminally" from the formulation of the prohibition against double punishment suggests, albeit indirectly, that "punishment" indeed may arise from either criminal or civil proceedings. See also *United States* v. *La Franca*, 282 U. S. 568, 573 (1931) (asking, but not answering, the question whether a penalty assessed in a civil proceeding may nonetheless constitute punishment for the purposes of double jeopardy analysis).

United States ex rel. Marcus v. *Hess* is closer to the point, but it, too, does not preclude the District Court's judgment. In *Hess*, electrical contractors were indicted for defrauding the Government by bidding collusively on public-works projects. They pleaded *nolo contendere* and were fined $54,000. 317 U. S., at 545. Subsequently, a group of private plaintiffs brought a *qui tam* action in the name of the United States against the defendants pursuant to a statute providing that a person guilty of defrauding the Government was subject to a civil penalty of $2,000 for each violation, double the amount of actual damages, and the costs of the suit.[5] The plaintiffs obtained a judgment for $315,000, of which $112,000 reflected the $2,000 per-count figure for the 56 counts and $203,000 was for double damages. *Id.*, at 540.

The defendants challenged the judgment on double jeopardy grounds, arguing, as did the defendant in *Mitchell*, that the proceeding was barred as a second attempt to punish the defendants criminally. This Court dispensed with this claim of criminal punishment, precisely as it had in *Mitchell*, by reference to the statute. The Court held that the chief purpose of the statute "was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole." 317 U. S., at 551–552. Since proceedings under the statute were remedial and designed to "protect the government from financial loss"—rather than to "vindicate public justice"—they were civil in nature. *Id.*, at 548–549.

Because the defendants in *Hess* had been punished in a prior criminal proceeding (as Mitchell had not), the Court faced a further double jeopardy problem: whether (as in the instant case) the second sanction was barred because it constituted a second punishment. Under the *qui tam* provision of the statute, the Government's share of the recovery was $150,000, *id.*, at 545, for actual damages of $101,500. Although the recovery was greater than the precise amount of the actual damages, the Court recognized, at least with respect to "the remedy now before [it]," that the lump sum and double damages provided by statute did not "do more than afford the government complete indemnity for the injuries done it." *Id.*, at 549. Those injuries, of course, included not merely the amount of the fraud itself, but also ancillary costs, such as the costs of detection and investigation, that routinely attend the Government's efforts to root out deceptive practices directed at the public purse. *Id.*, at 551–552. Since the actual costs to the Government roughly equaled the damages recovered, in rejecting the defendants' double jeopardy claim, the Court simply did not face the stark situation presently before us where the recovery is exponentially greater than the amount of the fraud, and, at least in the District Court's informed view, is also many times the amount of the Government's total loss.

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[5] Under the *qui tam* provisions of the Act, 31 U. S. C. § 3730(b), a private party may bring suit in the name of the United States. If the suit is successful, the plaintiff may receive what the District Court deems to be a reasonable portion of the civil penalty and damages, though this share may not exceed 25% of the proceeds of the action and an amount for reasonable expenses necessarily incurred and costs. § 3730(c)(2).

Nor did the Court face such a situation in *Rex Trailer*. In that case, the defendants fraudulently purchased five trucks under the Surplus Property Act of 1944, by claiming veteran priority rights to which they were not entitled. They pleaded *nolo contendere* to criminal charges and paid fines aggregating $25,000. The Government then brought a civil action under the Surplus Property Act of 1944, 58 Stat. 765, 780, which provided three alternative civil remedies: (1) $2,000 for each act plus double damages and costs; (2) recovery "as liquidated damages" of twice the consideration agreed to be given; and (3) recovery of the property plus, "as liquidated damages," retention of the consideration given. See 350 U. S., at 149, n. 1. The Government sought the first of these remedies which the Court considered "comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss." *Id.*, at 153. The Court rejected the defendants' claim that the $2,000-per-count penalty constituted a second punishment. Although the Court recognized that the Government's actual loss due to the defendants' fraud was difficult if not impossible to ascertain, it recognized that the Government did sustain injury due to the resultant decrease of motor vehicles available to Government agencies, an increase in undesirable speculation, and damage to its program of promoting bona fide sales to veterans.[6] Since the function of a liquidated damages provision was to provide a measure of recovery where damages are difficult to quantify, the Court found "on the record before it—where the defendants were liable for only $10,000—that they had not been subjected to a "measure of recovery . . . so unreasonable or excessive" as to constitute a second criminal punishment in violation of double jeopardy. *Id.*, at 154. See also *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 237 (1972) (customs forfeiture "provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses").

The relevant teaching of these cases is that the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis. These cases do not tell us, because the problem was not presented in them, what the Constitution commands when one of those imprecise formulas authorizes a supposedly remedial sanction that does not remotely approximate the Government's damages and actual costs, and rough justice becomes clear injustice. That such a circumstance might arise appears to be anticipated not only in *Mitchell*, as noted above, but also in the explicitly case-specific holdings of *Hess* and *Rex Trailer*.

III

We turn, finally, to the unresolved question implicit in our cases: whether and under what circumstances a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause. As noted above, the Government takes the position that punishment in the relevant sense is meted out only in criminal proceedings, and that whether proceedings are criminal or civil is a matter of statutory construction. The Government correctly observes that this Court has followed this abstract approach when determining whether the procedural protections of the Sixth Amendment apply to proceedings under a given statute, in affixing the appropriate standard of proof for such proceedings, and in determining whether double jeopardy protections should be applied. See *United States* v. *Ward*, 448 U. S., at 248–251. But while recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the "humane interests" safeguarded by the Double Jeopardy Clause's proscription of multiple punishments. See *Hess*, 317 U. S., at 554 (concurring opinion of Frankfurter, J.). This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.[7]

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[6] The Court could have included the Government's investigative and prosecutorial costs. These also must be factored into a determination as to whether the sanction was disproportionate to the Government's loss.

In making this assessment, the labels "criminal" and "civil" are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. *Ibid.*[8] The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. Cf. *Hicks* v. *Feiock*, 485 U. S. 624, 631 (1988) ("[T]he labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law"). To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.

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[7] This is not to say that whether a sanction constitutes punishment must be determined from the defendant's perspective. On the contrary, our cases have acknowledged that for the defendant even remedial sanctions carry the sting of punishment. See, *e. g.*, *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 551 (1943). Rather, we hold merely that in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated.

[8] As the name indicates, punitive damages, available in civil cases, serve punitive goals. *Day* v. *Woodworth*, 13 How. 363, 371 (1852). By the

These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. See, *e. g.*, *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168 (1963) (these are the "traditional aims of punishment"). Furthermore, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." *Bell* v. *Wolfish*, 441 U. S. 520, 539, n. 20 (1979). From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. Cf. *Mendoza-Martinez*, 372 U. S., at 169 (whether sanction appears excessive in relation to its nonpunitive purpose is relevant to determination whether sanction is civil or criminal). We therefore hold that under the Double Jeopardy Clause a defendant who already has been

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same token, strict liability crimes are principally directed at social betterment rather than punishment of culpable individuals. See *United States* v. *Balint*, 258 U. S. 250, 252 (1922).

punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

We acknowledge that this inquiry will not be an exact pursuit. In our decided cases we have noted that the precise amount of the Government's damages and costs may prove to be difficult, if not impossible, to ascertain. See, *e. g., Rex Trailer,* 350 U. S., at 153. Similarly, it would be difficult if not impossible in many cases for a court to determine the precise dollar figure at which a civil sanction has accomplished its remedial purpose of making the Government whole, but beyond which the sanction takes on the quality of punishment. In other words, as we have observed above, the process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice. Our upholding reasonable liquidated damages clauses reflects this unavoidable imprecision. Similarly, we have recognized that in the ordinary case fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole.

We cast no shadow on these time-honored judgments. What we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused. The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.[9] We must leave to the trial court the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment. Cf. *Morris* v. *Mathews*, 475 U. S. 237 (1986) (reducing criminal conviction to lesser included offense in order to avoid double jeopardy bar); see also *Peterson* v. *Richardson*, 370 F. Supp. 1259, 1267 (ND Tex 1973), aff'd *sub nom. Peterson* v. *Weinberger*, 508 F. 2d 45 (CA5), cert. denied *sub nom. Peterson* v. *Mathews*, 423 U. S. 830 (1975) (imposing less than full civil sanction authorized by False Claims Act when the full sanction would be unreasonable and not remotely related to actual loss). While the trial court's judgment in these matters often may amount to no more than an approximation, even an approximation will go far towards ensuring both that the Government is fully compensated for the costs of corruption and that, as required by the Double Jeopardy Clause, the defendant is protected from a sanction so disproportionate to the damages caused that it constitutes a second punishment.

We do not consider our ruling far reaching or disruptive of the Government's need to combat fraud. Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive. In such a case, the Double Jeopardy Clause simply is not implicated. Nor does the decision prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding. In a single proceeding the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature. See, *e. g.*, *Missouri* v. *Hunter*, 459 U. S. 359, 368–369 (1983) ("Where . . . a legislature specifically authorizes cumulative punishment under two statutes . . . the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial").[10] Finally, nothing in today's opinion precludes a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment. The protections of the Double Jeopardy Clause are not triggered by litigation between private parties.[11] In other words, the only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole.[12]

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[9] Had Halper been found liable under the False Claims Amendment Act of 1986, see n. 3, *supra*, the civil penalty against him would have amounted to more than $326,755.

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[10] That the Government seeks the civil penalty in a second proceeding is critical in triggering the protections of the Double Jeopardy Clause. Since a legislature may authorize cumulative punishment under two statutes for a single course of conduct, the multiple-punishment inquiry in the context of a single proceeding focuses on whether the legislature actually authorized the cumulative punishment. See *Ohio* v. *Johnson*, 467 U. S. 493, 499–500 (1984). On the other hand, when the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding.

[11] We express no opinion as to whether a *qui tam* action, such as the one in *Hess*, is properly characterized as a suit between private parties for the purposes of this rule. In contrast to the plaintiff in a private-attorney-general action, the private party in a *qui tam* action brings suit in the name of the United States and shares with the Government any proceeds of the action. 31 U. S. C. § 3730. In *Hess*, the Court assumed but did not decide that a *qui tam* action could give rise to double jeopardy. Since this assumption was not essential to the judgment in *Hess*, we consider the issue unresolved.

[12] It hardly seems necessary to state that a suit under the Act alleging one or two false claims would satisfy the rational-relationship requirement. It is only when a sizable number of false claims is present that, as a practical matter, the issue of double jeopardy may arise.

IV

Returning to the case at hand, the District Court found a "tremendous disparity" between the Government's actual damages and the civil penalty authorized by the Act. 664 F. Supp., at 855. The court approximated the Government's expenses at no more than $16,000, as compared to the asserted liability of Halper in excess of $130,000. 660 F. Supp., at 534. Although the Government apparently did not challenge the District Court's figure—choosing instead to litigate the legal issue we now decide—we think it unfair to deprive the Government of an opportunity to present to the District Court an accounting of its actual costs arising from Halper's fraud, to seek an adjustment of the District Court's approximation, and to recover its demonstrated costs. While we agree with the District Court that the disparity between its approximation of the Government's costs and Halper's $130,000 liability is sufficiently disproportionate that the sanction constitutes a second punishment in violation of double jeopardy, we remand the case to permit the Government to demonstrate that the District Court's assessment of its injuries was erroneous.

The judgment of the District Court is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring.

I join the opinion of the Court and write only to discuss the limits of today's holding. As the Court points out, our holding will not undermine the Government's efforts to enforce the laws effectively, since appropriate alternatives remain to ensure the Government's ability to make full use of the sanctions authorized by statute. *Ante*, at 450–451. Our rule permits the imposition in the ordinary case of at least a fixed penalty roughly proportionate to the damage caused or a reasonably liquidated amount, plus double damages. *Ante,* at 449.

Today's holding, I would stress, constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding. Cf. *Hicks* v. *Feiock,* 485 U. S. 624, 635 (1988); *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 168–169 (1963). Such an inquiry would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in name. It also would breed confusion among legislators who seek to structure the mechanisms of proper law enforcement within constitutional commands. In approaching the sometimes difficult question whether an enactment constitutes what must be deemed a punishment, we have recognized that a number of objective factors bear on the inquiry. *Ibid.* In the case before us, I agree with the Court that the controlling circumstance is whether the civil penalty imposed in the second proceeding bears any rational relation to the damages suffered by the Government. Here it does not, so it must be considered punishment for purposes of the Double Jeopardy Clause.

KENTUCKY DEPARTMENT OF CORRECTIONS ET AL. *v.* THOMPSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87–1815. Argued January 18, 1989—Decided May 15, 1989

Following the District Court's issuance of a consent decree settling a class action brought by Kentucky penal inmates under 42 U. S. C. § 1983, the Commonwealth promulgated "Corrections Policies and Procedures," which, *inter alia*, contain a nonexhaustive list of prison visitors who "may be excluded," including those who "would constitute a clear and probable danger to the institution's security or interfere with [its] orderly operation." The Kentucky State Reformatory at La Grange subsequently issued its own "Procedures Memorandum," which, in addition to including language virtually identical to that of the state regulations, sets forth procedures under which a visitor "may" be refused admittance and have his or her visitation privileges suspended by reformatory officials. After the reformatory refused to admit several visitors and denied them future visits without providing them a hearing, the representatives of an inmate class filed a motion with the District Court, claiming, among other things, that the suspensions violated the Due Process Clause of the Fourteenth Amendment. The court agreed and directed that minimal due process procedures be developed. The Court of Appeals affirmed and remanded, concluding, *inter alia*, that the language of the relevant prison policies created a liberty interest protected by the Due Process Clause.

Held: The Kentucky regulations do not give state inmates a liberty interest in receiving visitors that is entitled to the protections of the Due Process Clause. Pp. 459–465.

(a) In order to create a protected liberty interest in the prison context, state regulations must use "explicitly mandatory language" in connection with the establishment of "specific substantive predicates" to limit official discretion, and thereby require that a particular outcome be reached upon a finding that the relevant criteria have been met. *Hewitt* v. *Helms*, 459 U. S. 460, 472. Pp. 459–463.

(b) Although the regulations at issue do provide certain "substantive predicates" to guide prison decisionmakers in determining whether to allow visitation, the regulations lack the requisite relevant mandatory language, since visitors "may," but need not, be excluded whether they fall within or without one of the listed categories of excludable visitors.

Thus, the regulations are not worded in such a way that an inmate could reasonably form an objective expectation that a visit would necessarily be allowed absent the occurrence of one of the listed conditions or reasonably expect to enforce the regulations against prison officials should that visit not be allowed. Pp. 463–465.

833 F. 2d 614, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 465. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 465.

Barbara Willett Jones argued the cause for petitioners. With her on the briefs was *Leslie Patterson Vose*.

Joseph S. Elder II argued the cause and filed a brief for respondents.*

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we consider whether Kentucky prison regulations give state inmates, for purposes of the Fourteenth Amendment, a liberty interest in receiving certain visitors.

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*A brief of *amici curiae* urging reversal was filed for the State of Tennessee et al. by *W. J. Michael Cody*, Attorney General of Tennessee, and *Michael W. Catalano*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Don Siegelman* of Alabama, *Grace Berg Schaible* of Alaska, *Robert K. Corbin* of Arizona, *John Steven Clark* of Arkansas, *Joseph Lieberman* of Connecticut, *Robert Butterworth* of Florida, *Jim Jones* of Idaho, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Michael C. Moore* of Mississippi, *William L. Webster* of Missouri, *Brian McKay* of Nevada, *W. Cary Edwards* of New Jersey, *Hal Stratton* of New Mexico, *Lacy H. Thornburg* of North Carolina, *Anthony J. Celebrezze, Jr.*, of Ohio, *Robert Henry* of Oklahoma, *LeRoy S. Zimmerman* of Pennsylvania, *Travis Medlock* of South Carolina, *Robert A. Tellinghuisen* of South Dakota, *Jim Mattox* of Texas, *David L. Wilkinson* of Utah, *Kenneth O. Eikenberry* of Washington, *Don J. Hanaway* of Wisconsin, and *Joseph B. Meyer* of Wyoming.

I

In September 1976, Kentucky inmates brought a federal class action under 42 U. S. C. § 1983 challenging conditions of confinement in the Kentucky State Penitentiary at Eddyville. Other cases, one of them relating to the Kentucky State Reformatory at La Grange, were consolidated with the one concerning the penitentiary. The litigation was settled by a consent decree dated 28 May 1980, and supplemented 22 July 1980, containing provisions governing a broad range of prison conditions. App. 2–44, 45–55. See *Kendrick* v. *Bland*, 541 F. Supp. 21, 27–50 (WD Ky. 1981); see also *Kendrick* v. *Bland*, 740 F. 2d 432 (CA6 1984). Of sole relevance here, the consent decree provides: "The Bureau of Corrections encourages and agrees to maintain visitation at least at the current level, with minimal restrictions," and to "continue [its] open visiting policy." See 541 F. Supp., at 37.

The Commonwealth in 1981 issued "Corrections Policies and Procedures" governing general prison visitation, including a nonexhaustive list of visitors who may be excluded.[1] Four years later, the reformatory issued its own more detailed "Procedures Memorandum" on the subject of "Visiting Regulations." The memorandum begins with a Statement of Policy and Purpose: "Although administrative staff reserves the right to allow or disallow visits, it is the policy of the Kentucky State Reformatory to respect the right of inmates to have visits in the spirit of the Court decisions and the Consent Decree, while insuring the safety and security of the institution." App. 106. The memorandum then goes on to state that a visitor may be denied entry if his or her presence would constitute a "clear and probable danger to the safety and security of the institution or would interfere with the orderly operation of the institution." ¶ K(1)(a), App. 133. A nonexhaustive list of nine specific reasons for excluding visitors is set forth.[2] The memorandum also states that the

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[1] The relevant provision states:

"Certain visitors who are either a threat to the security or order of the institution or nonconducive to the successful re-entry of the inmate to the community may be excluded. These are, but not restricted to:

"A. The visitor's presence in the institution would constitute a clear and probable danger to the institution's security or interfere with the orderly operation of the institution.

"B. The visitor has a past record of disruptive conduct.

"C. The visitor is under the influence of alcohol or drugs.

"D. The visitor refuses to submit to search, if requested to do so, or show proper identification.

"E. The visitor is directly related to the inmate's criminal behavior.

"F. The visitor is currently on probation or parole and does not have special written permission from both his or her Probation or Parole Officer and the institutional Superintendent." Commonwealth of Kentucky Corrections Policies and Procedures § 403.06 (issued Aug. 28, 1981, effective Sept. 28, 1981); App. 101–102.

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[2] The memorandum reads in relevant part:

"K. *Visitor Refused Admittance*

"1. A visitor may be denied a visit at any time if one or more of the following exists or there are reasonable grounds to believe that:

"a. The visitor's presence in the institution would constitute a clear and probable danger to the safety and security of the institution or would interfere with the orderly operation of the institution, including, but not limited to:

"(1) The visitor has a past record of disruptive conduct.

"(2) The visitor is under the influence of alcohol or drugs.

"(3) The visitor refuses to submit to search or show proper identification upon request.

"(4) The visitor is directly related to the inmate's criminal behavior.

"(5) The visit will be detrimental to the inmate's rehabilitation.

"(6) The visitor is a former resident currently on parole who does not have the approval of his Parole Officer or the Warden.

"(7) The visitor is a former resident who has left by maximum expiration of sentence and does not have the prior approval of the Warden.

"(8) The visitor has previously violated institutional visiting policies.

"(9) Former employees of the Kentucky State Reformatory will not be allowed to visit inmates unless they have authorization from the Warden prior to the time of the visit.

[Footnote 2 is continued on p. 458]

decision whether to exclude a visitor rests with the duty officer, who is to be consulted by any staff member who "feels a visitor should not be allowed admittance." ¶ K(3), App. 134.

This particular litigation was prompted in large part by two incidents when applicants were denied the opportunity to visit an inmate at the reformatory. The mother of one inmate was denied visitation for six months because she brought to the reformatory a person who had been barred for smuggling contraband. Another inmate's mother and woman friend were denied visitation for a limited time when the inmate was found with contraband after a visit by the two women. In both instances the visitation privileges were suspended without a hearing. The inmates were not prevented from receiving other visitors.

The representatives of the *Kendrick*-inmate class filed a motion with the United States District Court for the Western District of Kentucky (the court which had issued the consent decree), claiming that the suspension of visitation privileges without a hearing in these two instances violated the decree and the Due Process Clause of the Fourteenth Amendment.

"2. A master log will be kept at the Visiting Desk of all visitors who have been denied a visit for any of the reasons listed above. A visitor who is denied a visit will not be allowed to visit an inmate for up to six (6) months following the incident. Persons who bring dangerous drugs or contraband into the institution may be denied visits indefinitely, until permission is granted by the Warden. The Duty Officer has the responsibility of denying a visit for the above reasons.

"a. The master log will be furnished to all institutions and updated as required.

"3. Any time a staff member feels a visitor should not be allowed admittance for any of the reasons above, the Shift Supervisor and the Duty Officer shall be notified. The final decision will be with the Duty Officer. All decisions will be documented. If it is felt that the individual presents a serious threat of danger to himself or others the Kentucky State Police will be advised of the situation so they may make a decision on whether their intervention is needed." Kentucky State Reformatory Procedures Memorandum, No. KSR 16-00-01 (issued and effective Sept. 30, 1985); App. 132-134.

By a memorandum dated June 26, 1986, the District Court found that the prison policies did not violate the decree, App. 147, but concluded that the language of the decree was "mandatory in character," *id.*, at 148, and that, under the standards articulated by this Court in *Hewitt* v. *Helms*, 459 U. S. 460 (1983), respondents "possess a liberty interest in open visitation." The District Court directed petitioners to develop "minimal due process procedures," including "an informal, nonadversary review in which a prisoner receives notice of and reasons for" any decision to exclude a visitor, as well as an opportunity to respond. App. 148. A formal order was issued accordingly. *Id.*, at 149.

The United States Court of Appeals for the Sixth Circuit affirmed and remanded the case. 833 F. 2d 614 (1987). Relying not only on the consent decree but also on the regulations and stated policies, the court held that the relevant language was sufficiently mandatory to create a liberty interest. The Court of Appeals found that the relevant prison policies "placed 'substantive limitations on official discretion.'" *Id.*, at 618–619, quoting *Olim* v. *Wakinekona*, 461 U. S. 238, 249 (1983). The court also found that the language of the consent decree, that "[d]efendants *shall* continue their open visiting policy" (emphasis supplied by Court of Appeals), see *Kendrick* v. *Bland*, 541 F. Supp., at 37, coupled with a provision from the policy statement that "[a]n inmate *is* allowed three (3) separate visits . . . per week" (emphasis added by Court of Appeals), Reformatory Procedures ¶ B(3), App. 108, satisfied the requirement of "mandatory language" articulated by our prior cases. See 833 F. 2d, at 618.

Because this case appeared to raise important issues relevant to general prison administration, we granted certiorari. 487 U. S. 1217 (1988).

II

The Fourteenth Amendment reads in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law," and protects "the individual against arbitrary action of government," *Wolff* v. *McDonnell*, 418 U. S. 539, 558 (1974). We examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State, *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 571 (1972); the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient, *Hewitt* v. *Helms*, 459 U. S., at 472. The types of interests that constitute "liberty" and "property" for Fourteenth Amendment purposes are not unlimited; the interest must rise to more than "an abstract need or desire," *Board of Regents of State Colleges* v. *Roth*, 408 U. S., at 577, and must be based on more than "a unilateral hope," *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458, 465 (1981). Rather, an individual claiming a protected interest must have a legitimate claim of entitlement to it. Protected liberty interests "may arise from two sources—the Due Process Clause itself and the laws of the States." *Hewitt* v. *Helms*, 459 U. S., at 466.

Respondents do not argue—nor can it seriously be contended, in light of our prior cases—that an inmate's interest in unfettered visitation is guaranteed directly by the Due Process Clause. We have rejected the notion that "*any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause." (Emphasis in original.) *Meachum* v. *Fano*, 427 U. S. 215, 224 (1976). This is not to say that a valid conviction extinguishes every direct due process protection; "consequences visited on the prisoner that are qualitatively different from the punishment characteristically suffered by a person convicted of crime" may invoke the protections of the Due Process Clause even in the absence of a state-created right. *Vitek* v. *Jones*, 445 U. S. 480, 493 (1980) (transfer to mental hospital). However, "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Montanye* v. *Haymes*, 427 U. S. 236, 242 (1976). The denial of prison access to a particular visitor "is well within the terms of confinement ordinarily contemplated by a prison sentence," *Hewitt* v. *Helms*, 459 U. S., at 468, and therefore is not independently protected by the Due Process Clause.

We have held, however, that state law may create enforceable liberty interests in the prison setting. We have found, for example, that certain regulations granted inmates a protected interest in parole, *Board of Pardons* v. *Allen*, 482 U. S. 369 (1987); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1 (1979), in good-time credits, *Wolff* v. *McDonnell*, 418 U. S., at 556–572, in freedom from involuntary transfer to a mental hospital, *Vitek* v. *Jones*, 445 U. S., at 487–494, and in freedom from more restrictive forms of confinement within the prison, *Hewitt* v. *Helms*, *supra*. In contrast, we have found that certain state statutes and regulations did not create a protected liberty interest in transfer to another prison. *Meachum* v. *Fano*, 427 U. S., at 225 (intrastate transfer); *Olim* v. *Wakinekona*, *supra* (interstate transfer). The fact that certain state-created liberty interests have been found to be entitled to due process protection, while others have not, is not the result of this Court's judgment as to what interests are more significant than others; rather, our method of inquiry in these cases always has been to examine closely the language of the relevant statutes and regulations.[3]

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[3] Petitioners and their *amici* urge us to adopt a rule that prison regulations, regardless of the mandatory character of their language or the extent to which they limit official discretion, "do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement." See Brief for Petitioners 10. They argue that this bright line would allow prison officials to issue guidelines to prison staff to govern minor decisions, without thereby transforming the details of prison life into "liberty inter-

Stated simply, "a State creates a protected liberty interest by placing substantive limitations on official discretion." *Olim* v. *Wakinekona*, 461 U. S., at 249. A State may do this in a number of ways. Neither the drafting of regulations nor their interpretation can be reduced to an exact science. Our past decisions suggest, however, that the most common manner in which a State creates a liberty interest is by establishing "substantive predicates" to govern official decisionmaking, *Hewitt* v. *Helms*, 459 U. S., at 472, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.

Most of our procedural due process cases in the prison context have turned on the presence or absence of language creating "substantive predicates" to guide discretion. For example, the failure of a Connecticut statute governing commutation of sentences to provide "particularized standards or criteria [to] guide the State's decisionmakers," *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S., at 467 (BRENNAN, J., concurring), defeated an inmate's claim that the State had created a liberty interest. *Id.*, at 465 (majority opinion). See also *Olim* v. *Wakinekona*, 461 U. S., at 249–250 (interstate prison transfer left to "completely unfettered" discretion of administrator); *Meachum* v. *Fano*, 427 U. S., at 228 (intrastate prison transfer at discretion of officials); *Montanye* v. *Haymes*, 427 U. S., at 243 (same). In other instances, we have found that prison regulations or statutes *do* provide decisionmaking criteria which serve to limit discretion. See, *e. g.*, *Hewitt* v. *Helms*, 459 U. S., at 472 (administrative segregation not proper absent particular substantive predicates); *Board of Pardons* v. *Allen*, 482 U. S., at 381 (parole granted unless certain standards met, even though the decision is "'necessarily subjective . . . and predictive'").

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ests" with accompanying procedural rights. Inasmuch as a "bright line" of this kind is not necessary for a ruling in favor of petitioners, we refrain from considering it at this time. We express no view on the proposal and leave its resolution for another day.

We have also articulated a requirement, implicit in our earlier decisions, that the regulations contain "explicitly mandatory language," *i. e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow, in order to create a liberty interest. See *Hewitt* v. *Helms*, 459 U. S., at 471–472. The regulations at issue in *Hewitt* mandated that certain procedures be followed, and "that administrative segregation will not occur absent specified substantive predicates." *Id.*, at 472. In *Board of Pardons* v. *Allen*, *supra*, the relevant statute "use[d] mandatory language ('shall') to 'creat[e] a presumption that parole release will be granted' when the designated findings are made," 482 U. S., at 377–378, quoting *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S., at 12. See also *id.*, at 11 (statute providing that board "shall order" release unless one of four specified conditions is found). In sum, the use of "explicitly mandatory language," in connection with the establishment of "specified substantive predicates" to limit discretion, forces a conclusion that the State has created a liberty interest. *Hewitt* v. *Helms*, 459 U. S., at 472.

III

The regulations and procedures at issue in this case do provide certain "substantive predicates" to guide the decisionmaker. See nn. 1 and 2, *supra*. The state procedures provide that a visitor "may be excluded" when, *inter alia*, officials find reasonable grounds to believe that the "visitor's presence in the institution would constitute a clear and probable danger to the institution's security or interfere with [its] orderly operation." See n. 1, *supra*. Among the more specific reasons listed for denying visitation are the visitor's connection to the inmate's criminal behavior, the visitor's past disruptive behavior or refusal to submit to a search or show proper identification, and the visitor's being under the influence of alcohol or drugs. *Ibid.* The reformatory procedures are nearly identical, and include a prohibition on a visit from a former reformatory inmate, without the prior approval of the warden. See n. 2, *supra*. These regulations and procedures contain standards to be applied by a staff member in determining whether to refer a situation to the duty officer for resolution, and require the staff member to notify the duty officer if the staff member feels that a visitor should not be allowed admittance. *Ibid.* The same "substantive predicates" undoubtedly are intended to guide the duty officer's discretion in making the ultimate decision.

The regulations at issue here, however, lack the requisite relevant mandatory language. They stop short of requiring that a particular result is to be reached upon a finding that the substantive predicates are met.[4] The Reformatory Procedures Memorandum begins with the caveat that "administrative staff reserves the right to allow or disallow visits," and goes on to note that "it is the policy" of the reformatory "to respect the right of inmates to have visits." App. 106. This language is not mandatory. Visitors *may* be excluded if they fall within one of the described categories, see n. 1, *supra*, but they need not be. Nor need visitors fall within one of the described categories in order to be excluded. The overall effect of the regulations is not such that an inmate can reasonably form an objective expectation that a visit would necessarily be allowed absent the occurrence of one of the listed conditions. Or, to state it differently, the regulations are not worded in such a way that an inmate could reasonably expect to enforce them against the prison officials.[5]

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[4] It should be obvious that the mandatory language requirement is not an invitation to courts to search regulations for *any* imperative that might be found. The search is for *relevant* mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whether an inmate may be deprived of the particular interest in question. Thus, one of the examples of mandatory language relied upon by the Court of Appeals is unavailing, that is, the statement that an inmate "is allowed three (3) separate visits in the Visiting Building per week." App. 108. This directive says nothing about whether any *particular* visitor must be admitted, and thus has no direct relevance to the decision whether to exclude a particular visitor, which is what is at issue here. Another example of irrelevant mandatory language is the following: "A visitor who is denied a visit *will not* be allowed to visit an inmate for up to six (6) months following the incident." (Emphasis added.) See n. 2, *supra*. This language refers only to the penalty to be imposed once an individual is found to be unfit to visit, and has no role to play in guiding prison officials' discretion in deciding whether to exclude a visitor in the first instance.

Because the regulations at issue here do not establish a liberty interest entitled to the protections of the Due Process Clause, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE KENNEDY, concurring.

I concur fully in the opinion and judgment of the Court. I write separately to note that this case involves a denial of prison access to particular visitors, not a general ban on all prison visitation. Nothing in the Court's opinion forecloses the claim that a prison regulation permanently forbidding all visits to some or all prisoners implicates the protections of the Due Process Clause in a way that the precise and individualized restrictions at issue here do not.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

As a result of today's decision, correctional authorities at the Kentucky State Reformatory are free to deny prisoners visits from parents, spouses, children, clergy members, and close friends for any reason whatsoever, or for no reason at all. Prisoners will not even be entitled to learn the reason, if any, why a visitor has been turned away. In my view, the exercise of such unbridled governmental power over the basic human need to see family members and friends strikes at the heart of the liberty protected by the Due Process Clause of the Fourteenth Amendment. Recognizing a liberty interest in this case would not create a right to "unfettered visitation," *ante*, at 460, but would merely afford prisoners rudimentary procedural safeguards against retaliatory or arbitrary denials of visits. Because the majority refuses to take this small step, I dissent.

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[5] The language of the consent decree, that "[d]efendants shall continue their open visiting policy," is mandatory only to the extent that it prevents the State from making its regulations more restrictive than they were at the time the decree was entered. Obviously, the promise to leave unchanged a discretionary policy does not transform that policy into a mandatory one. The District Court found that the regulations enacted after the decree was signed were no more restrictive than those already in place. App. 147. For this reason, we need make no judgment as to whether a consent decree can create a liberty interest protected by the Fourteenth Amendment. The issue was not briefed or argued by the parties or discussed below and is not necessary to our decision.

I

The majority begins its analysis by conceding, as it must under our precedents, that prisoners do not shed their constitutional rights at the prison gate, but instead retain a residuum of constitutionally protected liberty independent of any state laws or regulations. See *ante*, at 459–461.[1] In the balance of its opinion, however, the majority proceeds to prove the emptiness of this initial gesture. In concluding that prison visits implicate no retained liberty interest, the majority applies the following oft-cited test: "'As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight.'" *Ante*, at 460–461, quoting *Montanye* v. *Haymes*, 427 U. S. 236, 242 (1976). On its face, the "within the sentence" test knows few rivals for vagueness and pliability, not the least because a typical prison sentence says little more than that the defendant must spend a specified period of time behind bars. As applied, this test offers prisoners scant more protection, for the Justices employing it have rarely scrutinized the actual conditions of confinement faced by the prisoners in the correctional institutions at issue. Under this approach, therefore, "a prisoner crosses into limbo when he enters into penal confinement." *Hewitt* v. *Helms*, 459 U. S. 460, 482 (1983) (STEVENS, J., dissenting). In theory he retains some minimal interest in liberty protected by the Due Process Clause, but in practice this interest crystallizes only on those infrequent occasions when a majority of the Court happens to say so.[2]

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[1] "[I]f the inmate's protected liberty interests are no greater than the State chooses to allow, he is really little more than the slave described in the 19th century cases. I think it clear that even the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore." *Meachum* v. *Fano*, 427 U. S. 215, 233 (1976) (STEVENS, J., dissenting).

I have previously stated that, when prison authorities alter a prisoner's conditions of confinement, the relevant question should be whether the prisoner has suffered "a sufficiently 'grievous loss' to trigger the protection of due process." *Olim* v. *Wakinekona*, 461 U. S. 238, 252 (1983) (MARSHALL, J., dissenting), quoting *Vitek* v. *Jones*, 445 U. S. 480, 488 (1980); see also *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). The answer depends not only on the nature and gravity of the change, but also on whether the prisoner has been singled out arbitrarily for disparate treatment. "For an essential attribute of the liberty protected by the Constitution is the right to the same kind of treatment as the State provides to other similarly situated persons. A convicted felon, though he is properly placed in a disfavored class, retains this essential right." *Hewitt, supra*, at 485–486 (STEVENS, J., dissenting) (footnote omitted); see also *Olim, supra*, at 252 (MARSHALL, J., dissenting). Put another way, the retained liberty interest protected by the Constitution encompasses the right to be free from arbitrary governmental action affecting significant personal interests. See *Wolff* v. *McDonnell*, 418 U. S. 539, 571–572, n. 19 (1974).

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[2] The majority's refusal to take seriously the prisoners' retained liberty claim is demonstrated by its unwillingness to acknowledge this claim when, at the very outset of its opinion, it frames the issue in this case as one solely involving state-created rights. See *ante*, at 455.

Prison visits have long been recognized as critically important to inmates as well as to the communities to which the inmates ultimately will return.[3] Without visits, a prisoner "may be entirely cut off from his only contacts with the outside world." *Olim*, *supra*, at 253 (MARSHALL, J., dissenting). Confinement without visitation

> "brings alienation and the longer the confinement the greater the alienation. There is little, if any, disagreement that the opportunity to be visited by friends and relatives is more beneficial to the confined person than any other form of communication.
>
> "Ample visitation rights are also important for the family and friends of the confined person. . . . Preservation of the family unit is important to the reintegration of the confined person and decreases the possibility of recidivism upon release. . . . [V]isitation has demonstrated positive effects on a confined person's ability to adjust to life while confined as well as his ability to adjust to life upon release . . . ." National Conference of Commissioners on Uniform State Laws, Model Sentencing and Corrections Act § 4–115, Comment (1979) (hereinafter NCCUSL) (citations omitted).[4]

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[3] Cf. Leverson, Constitutional Limits on the Power to Restrict Access to Prisons: An Historical Re-Examination, 18 Harv. Civ. Rights-Civ. Lib. L. Rev. 409, 413–415 (1983) (describing widespread visitation practices in early English and American prisons).

[4] See also, *e. g.*, National Sheriffs' Association, Inmates' Legal Rights 67 (rev. ed. 1987) (hereinafter NSA) (visits "with family, friends and others [are] important if the inmate is to retain his ties to the community and his knowledge of what the free society is like"); U. S. Dept. of Justice, Federal Standards for Prisons and Jails, Standard 12.12, Discussion (1980) (hereinafter DOJ) ("Visiting is an important element in maintaining inmates' contact with outside society"); ABA Standards for Criminal Justice 23–6.2, Commentary (2d ed. 1980) (hereinafter ABA) ("Because almost all inmates ultimately will be returned to the community at the expiration of their

Consistent with this view, numerous governmental and private organizations which deal closely with correctional institutions have promulgated standards designed "to maximize visiting opportunities for inmates." U. S. Dept. of Justice, Federal Standards for Prisons and Jails, Standard 12.12 (1980).[5] Although the details vary, the standards uniformly provide that visitors should not be barred except for good cause shown. Kentucky itself, in its statewide Corrections Policies and Procedures (Commonwealth Procedures), recognizes that visits permit reformatory inmates such as Kenneth Bobbitt and Kevin Black "to maintain morale and contact with the community," and thus "are important to the inmate and his success within the community upon release." App. 98.

The majority intimates that the actions taken against prisoners Bobbitt and Black were based on good cause, see *ante*, at 458, but the very essence of these prisoners' factual allegations is that no such cause existed. *Id.*, at 57–58, 61, 66–68, 70–71. If Bobbitt and Black are correct, they may well have suffered a "grievous loss" by being singled out arbitrarily for unjustifiably harsh treatment. No evidence whatsoever indicates that visitors to the reformatory have ever been

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terms, it is important to preserve, wherever possible, family and community ties"); National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Standard 2.17, Commentary (1973) (hereinafter NAC) ("Strained ties with family and friends increase the difficulty of making the eventual transition back to the community. The critical value for offenders of a program of visiting with relatives and friends long has been recognized"); cf. *Thornburgh* v. *Abbott*, *ante*, at 407 ("Access [to prisons] is essential . . . to families and friends of prisoners who seek to sustain relationships with them . . ."); *Pell* v. *Procunier*, 417 U. S. 817, 825 (1974) (noting prison director's determination that personal visits "aid in the rehabilitation of the inmate while not compromising the other legitimate objectives of the corrections system").

[5] See also, *e. g.*, NSA, at 67; DOJ, Standards 12.12–12.15; NCCUSL, §§ 4–114, 4–118; ABA, Standard 23–6.2; American Correctional Assn., Standards for Adult Correctional Institutions, Standards 2–4380 to 2–4386 (2d ed. 1981); NAC, Standard 2.17.

barred for any reason except those enumerated as legitimate in the Commonwealth Procedures and the institution-specific Reformatory Procedures Memorandum (Reformatory Memorandum). See *ante*, at 456–458, nn. 1, 2. It is nowhere suggested, furthermore, that these prisoners' sentences contemplated denials of visits for nonenumerated reasons, or that such denials are "'well within the terms of confinement ordinarily contemplated'" in the reformatory. *Ante*, at 461, quoting *Hewitt*, 459 U. S., at 468. Under the majority's disposition, neither prisoner will ever have a right to contest the prison authorities' account. One need hardly be cynical about prison administrators to recognize that the distinct possibility of retaliatory or otherwise groundless deprivations of visits calls for a modicum of procedural protections to guard against such behavior.

II

Even if I believed that visit denials did not implicate a prisoner's retained liberty interest, I would nonetheless find that a liberty interest has been "created" by the Commonwealth's visitation regulations and policies.[6] As the majority notes, "'a State creates a protected liberty interest by placing substantive limitations on official discretion.'" *Ante*, at 462, quoting *Olim*, 461 U. S., at 249. I fully agree with the majority that "[t]he regulations and procedures at issue in this case do provide certain 'substantive predicates' to guide the decisionmaker." *Ante*, at 463. But I cannot agree that Kentucky's prison regulations do not create a liberty interest because they "lack the requisite relevant mandatory language." *Ante*, at 464.

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[6] Although the Court's past decisions establish that a liberty interest may be "created" by state regulations and policies, I have taken a somewhat different view of the relationship between such regulations and policies and the Due Process Clause. See *Olim* v. *Wakinekona*, 461 U. S. 238, 255, n. 6 (1983) (MARSHALL, J., dissenting), quoting *Hewitt* v. *Helms*, 459 U. S. 460, 488 (1983) (STEVENS, J., dissenting) ("Prison regulations 'provide evidentiary support for the conclusion that the [adverse action taken against a prisoner] affects a constitutionally protected interest in liberty,' but they 'do not *create* that interest'") (emphasis in *Hewitt*).

As an initial matter, I fail to see why mandatory language always is an essential element of a state-created liberty interest. Once it is clear that a State has imposed substantive criteria in statutes or regulations to guide or limit official discretion, there is no reason to assume—as the majority does—that officials applying the statutes or regulations are likely to ignore the criteria if there is not some undefined quantity of the words "shall" or "must." Drafters of statutes or regulations do not ordinarily view the criteria they establish as mere surplusage. Absent concrete evidence that state officials routinely ignore substantive criteria set forth in statutes or regulations (and there is no such evidence here), it is only proper to assume that the criteria are regularly employed *in practice*, thereby creating legitimate expectations worthy of protection by the Due Process Clause. Common sense suggests that expectations stem from practice as well as from the language of statutes or regulations. *Vitek* v. *Jones*, 445 U. S., at 489 (approving lower courts' reliance on "objective expectation, firmly fixed in state law and official Penal Complex practice").[7] This point escapes the majority, which apparently harbors the "unrealistic [belief] that variations such as the use of 'may' rather than 'shall' could negate the expectations derived from experience with a [prison] system and . . . enumerated criteria . . . ." *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 29–30, n. 9 (1979) (MARSHALL, J., dissenting) (citation omitted).

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[7] See also, *e. g.*, *Dace* v. *Mickelson*, 816 F. 2d 1277, 1279 (CA8 1987) (en banc) (a prisoner's "expectancy" is based on "a review of a state rule, regulation, or practice"); *Whitehorn* v. *Harrelson*, 758 F. 2d 1416, 1422 (CA11 1985) ("The court must examine the . . . practices of the prison officials in administering the program to determine whether [it] . . . place[s] a restriction on the prison official's discretion . . ."); *Parker* v. *Cook*, 642 F. 2d 865, 876 (CA5 Unit B 1981) ("[T]he interaction between written regulations and actual practices often produces results not apparent by a mere examination of the regulations"); cf. *Perry* v. *Sindermann*, 408 U. S. 593, 602 (1972) ("[T]here may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure").

Even if I thought it proper to rely on the presence or absence of mandatory language, I would still disagree with the majority's determination that the regulations here lack such language.[8] The majority relies primarily on a statement in the Reformatory Memorandum that "administrative staff reserves the right to allow or disallow visits." It is important, however, to put this "caveat," *ante*, at 464, in proper context. The Reformatory Memorandum's section on visitation occupies 33 pages of the joint appendix. The caveat appears just once in a general, introductory paragraph which also includes the statement that "it *is* the policy of the Kentucky State Reformatory to respect the right of inmates to have visits." App. 106 (emphasis added). Over the next 20 pages, the Reformatory Memorandum lays out in great detail the mandatory "procedures to be *enforced* in regard to *all* types of visits." *Ibid.* (emphasis added).[9] It states, for example, that "[v]isits *will* be conducted seven (7) days a week," *id.*, at 107 (emphasis added); that "[a]n inmate *is* allowed three (3) separate visits . . . per week," *id.*, at 108 (emphasis added); that "[t]here *will* be *no* visit list maintained which specifies who may visit an inmate," *ibid.* (emphasis added); that "[a]n inmate *is* allowed to have . . . three (3) adult visitors . . . per visit," *id.*, at 108–109 (emphasis added); that visits "*will* be one and one-half hours," *id.*, at 109 (emphasis added); and that "[e]ach inmate *will* be allowed one (1) outdoor visit per week," *id.*, at 125 (emphasis added).

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[8] The majority does not state clearly whether its rationale applies solely to prisoners in the reformatory, or to prisoners in all of the Commonwealth's correctional institutions. I read the majority opinion as limited to prisoners in the reformatory for several reasons. First, although the majority points to language both in the statewide Commonwealth Procedures and the institution-specific Reformatory Memorandum in first determining that there are sufficient substantive predicates cabining official discretion, *ante*, at 463–464, the majority relies exclusively on statements in the Reformatory Memorandum in finding insufficient mandatory language to create a liberty interest. *Ante*, at 464–465. Second, Bobbitt and Black—the only prisoners subject to visitation denials in this case—were both incarcerated in the reformatory at the time of the incidents giving rise to this litigation. Third, the Reformatory Memorandum is the only institution-specific set of rules before the Court. Tr. of Oral Arg. 28. It is quite possible that other correctional facilities in the Commonwealth have promulgated rules which create a liberty interest even under the majority's linguistic approach. As the Court of Appeals for the Sixth Circuit noted below, "it is unclear from the record what set of regulations governs visits in other parts of the Kentucky System." 833 F. 2d 614, 619 (1987).

[9] These procedures pertain to such matters as the days, lengths, times, and places for visits; the dress code for prisoners and visitors; the scope of permissible searches of prisoners and visitors; the type of contact permitted between prisoners and visitors; and the special rules for night visits

Only then does the Reformatory Memorandum enumerate the very specific reasons for which a visitor may be excluded. *Id.*, at 132–134, quoted *ante*, at 457–458, n. 2. The duty officer does not have unfettered discretion with respect to visitors. Rather, he "has the responsibility of denying a visit *for the above [enumerated] reasons.*" App. 134 (emphasis added). When a visit is denied, the reasons "*will* be documented." *Ibid.* (emphasis added). Presumably this means that the duty officer must keep a record of which of "the above reasons" caused him to exclude the visitor. The Reformatory Memorandum also expressly references the American Correctional Association's visitation standards, which provide that "visits may be limited *only* by the institution's schedule, space, and personnel constraints, or when there are substantial reasons to justify such limitations." American Correctional Association, Standards for Adult Correctional Institutions, Standard 2–4381 (2d ed. 1981) (emphasis added), cited at App. 106. Nothing in these standards even remotely contemplates the arbitrary exclusion of visitors.

When these mandatory commands are read in conjunction with the detailed rules set forth in the Commonwealth Procedures,[10] it is inconceivable that prisoners in the reformatory

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and outdoor visits, as well as for legal, clergy, and hospital visits. App. 106–132.

[10] Although the Commonwealth Procedures are somewhat less elaborate—because the individual correctional institutions are charged with

would not "reasonably form an objective expectation that a visit would necessarily be allowed absent the occurrence of one of the listed conditions." *Ante*, at 465. The majority inexplicably ignores nearly all of these commands, despite claiming to have considered the "overall effect of the regulations," *ibid.*, and despite the Commonwealth's striking concession that the regulations "repeatedly use 'will', 'shall', and similar directive or mandatory language" in an effort "to advise inmates and potential visitors what is *expected*." Brief for Petitioners 13, 30 (emphasis added); see also Tr. of Oral Arg. 5–6 ("[O]ur procedures are very limiting in the discretion of the officials").[11] In light of these mandatory commands, the caveat, as well as any other language that could be taken to suggest that visitors need not "fall within one of the described categories in order to be excluded," *ante*, at 464, amount to nothing more than mere boilerplate. The Court should reject the view that "state laws which impose substantive limitations and elaborate procedural requirements on official conduct create no liberty interest solely because there remains the possibility that an official will act in an arbitrary manner at the end of the process." *Olim*, 461 U. S., at 258–259 (MARSHALL, J., dissenting) (discussing holding in *Hewitt*); see also 461 U. S., at 259, n. 13 (discussing similar

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supplementing these statewide rules with ones designed to fit their own institutions—there is no shortage of mandatory language. Visits "*are* to be promoted and facilitated by each institution," *id.*, at 98 (emphasis added); "[a]t a minimum," weekend and holiday visiting "*shall* [be] permi[tted]," *id.*, at 99 (emphasis added); the individual institutions "*must* allow each inmate the opportunity to visit a minimum of eight hours per month," *ibid.* (emphasis added); and "[u]nder normal conditions, any [regular visitor] *can* visit *unless* visits could reasonably create a threat to the security and order of the institution," *id.*, at 100 (emphasis added).

[11] It is no answer to say that most of the mandatory commands are irrelevant because the decision "to exclude a particular visitor" is the only issue in this case. *Ante*, at 464, n. 4. After today's decision, there are no constraints whatsoever on the reformatory's ability to exclude *all* of an inmate's visitors simply by invoking its unreviewable discretion whenever a person seeks to visit the inmate.

holding in *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1 (1979); cf. *Brennan* v. *Cunningham*, 813 F. 2d 1, 8 (CA1 1987).

Finally, the majority's reliance on the fact that both the Commonwealth Procedures and the Reformatory Memorandum provide that a visitor "may" be excluded if he falls within one of the enumerated categories, *ante*, at 464, is misplaced. The word "may" in this context simply means that prison authorities possess the discretion to allow visits from persons who fall within one of the enumerated categories. Surely this possibility cannot defeat a prisoner's legitimate expectation that visitors will be denied *only* when they fall within one of those categories. In *Hewitt*, regulations regarding administrative segregation were deemed to have created a liberty interest even though they stated that a prisoner "may" be placed in segregation on the occurrence of specified substantive predicates. See 459 U. S., at 470, n. 6. Likewise, in *Vitek*, a prisoner had a state-created liberty interest in not being transferred to a mental hospital even though the applicable state statute provided that the director of correctional services "may" transfer a prisoner to such a hospital after certain medical findings are made. See 445 U. S., at 483, n. 1. If the use of the word "may" could not defeat a liberty interest in *Hewitt* or *Vitek*, I fail to see how it could do so here.

III

The prisoners in this case do not seek a right to unfettered visitation. All they ask is that the Court recognize that visitation is sufficiently important to warrant procedural protections to ensure that visitors are not arbitrarily denied. The protections need not be extensive, but simply commensurate with the special "needs and exigencies of the institutional environment." *Wolff*, 418 U. S., at 555. In making the threshold determination that the denial of visits can never implicate a prisoner's liberty interest, the majority thus establishes that when visitors are turned away, *no* process, not even notice, is constitutionally due. I cannot accept such a parsimonious reading of the Due Process Clause, and therefore dissent.

RODRIGUEZ DE QUIJAS ET AL. v. SHEARSON/ AMERICAN EXPRESS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-385. Argued March 27, 1989—Decided May 15, 1989

Petitioners, securities investors, signed a standard customer agreement which included an agreement to settle account disputes through binding arbitration unless the agreement was found unenforceable under federal or state law. When the investments turned sour, petitioners brought suit in the District Court against, *inter alios*, respondent brokerage firm, alleging that their money was lost in unauthorized and fraudulent transactions in violation of, among other things, the provisions of the Securities Act of 1933 and the Securities and Exchange Act of 1934. The District Court ordered all but the Securities Act claims to be submitted to arbitration, holding that those claims must proceed in the court action pursuant to the ruling in *Wilko* v. *Swan*, 346 U. S. 427, that an agreement to arbitrate Securities Act claims is void under § 14 of the Act, which prohibits a binding stipulation "to waive compliance with any provision" of the Act. The Court of Appeals reversed, concluding that the arbitration agreement is enforceable because this Court's subsequent decisions have reduced *Wilko* to "obsolescence."

Held: A predispute agreement to arbitrate claims under the Securities Act of 1933 is enforceable and resolution of the claims only in a judicial forum is not required. Pp. 479-486.

(a) *Wilko* is overruled. It was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions. See, particularly, *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, which declined to read § 29(a) of the 1934 Act, which is identical to § 14 of the 1933 Act, to prohibit enforcement of predispute agreements to arbitrate, and which stressed the strong language of the Arbitration Act declaring a federal policy favoring arbitration. It would be undesirable for *Wilko* and *McMahon* to exist side by side because their inconsistency is at odds with the principle that the 1933 and 1934 Acts be construed harmoniously in order to discourage litigants from manipulating their allegations merely to cast their claims under one rather than the other securities law. Pp. 479-485.

(b) The customary rule of retroactive application—that the law announced in the Court's decision controls the case at bar—is appropriate here. Although the decision to overrule *Wilko* establishes a new principle of law, the ruling furthers the purpose and effect of the Arbitration Act without undermining those of the Securities Act; it does not produce substantial inequitable results; and resort to arbitration does not inherently undermine any of petitioners' substantive rights under the Securities Act. Pp. 485–486.

845 F. 2d 1296, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 486.

Denis A. Downey argued the cause and filed briefs for petitioners.

Theodore A. Krebsbach argued the cause for respondent. With him on the brief was *Jeffrey L. Friedman*.*

JUSTICE KENNEDY delivered the opinion of the Court.

The question here is whether a predispute agreement to arbitrate claims under the Securities Act of 1933 is unenforceable, requiring resolution of the claims only in a judicial forum.

I

Petitioners are individuals who invested about $400,000 in securities. They signed a standard customer agreement with the broker, which included a clause stating that the parties agreed to settle any controversies "relating to [the] accounts" through binding arbitration that complies with specified procedures. The agreement to arbitrate these controversies is unqualified, unless it is found to be unenforceable under federal or state law. Customer's Agreement ¶ 13. The investments turned sour, and petitioners eventually sued respondent and its broker-agent in charge of the accounts, alleging that their money was lost in unauthorized and fraudulent transactions. In their complaint they

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**Paul Windels III* filed a brief for the Securities Industry Association et al. as *amici curiae* urging affirmance.

pleaded various violations of federal and state law, including claims under § 12(2) of the Securities Act of 1933, 15 U. S. C. § 77*l*(2), and claims under three sections of the Securities Exchange Act of 1934.

The District Court ordered all the claims to be submitted to arbitration except for those raised under § 12(2) of the Securities Act. It held that the latter claims must proceed in the court action under our clear holding on the point in *Wilko* v. *Swan*, 346 U. S. 427 (1953). The District Court reaffirmed its ruling upon reconsideration and also entered a default judgment against the broker, who is no longer in the case. The Court of Appeals reversed, concluding that the arbitration agreement is enforceable because this Court's subsequent decisions have reduced *Wilko* to "obsolescence." *Rodriguez de Quijas* v. *Shearson/Lehman Bros., Inc.*, 845 F. 2d 1296, 1299 (CA5 1988). We granted certiorari, 488 U. S. 954 (1988).

II

The *Wilko* case, decided in 1953, required the Court to determine whether an agreement to arbitrate future controversies constitutes a binding stipulation "to waive compliance with any provision" of the Securities Act, which is nullified by § 14 of the Act. 15 U. S. C. § 77n. The Court considered the language, purposes, and legislative history of the Securities Act and concluded that the agreement to arbitrate was void under § 14.* But the decision was a difficult one in view of the competing legislative policy embodied in the Arbitration Act, which the Court described as "not easily reconcilable," and which strongly favors the enforcement of agreements to arbitrate as a means of securing "prompt, eco-

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*The Court carefully limited its holding to apply only to arbitration agreements which are made "prior to the existence of a controversy." 346 U. S., at 438; see *id.*, at 438–439 (Jackson, J., concurring). In contrast, "courts uniformly have concluded that *Wilko* does not apply to the submission to arbitration of existing disputes." *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 233 (1987).

nomical and adequate solution of controversies." 346 U. S., at 438.

It has been recognized that *Wilko* was not obviously correct, for "the language prohibiting waiver of 'compliance with any provision of this title' could easily have been read to relate to substantive provisions of the Act without including the remedy provisions." *Alberto-Culver Co.* v. *Scherk*, 484 F. 2d 611, 618, n. 7 (CA7 1973) (Stevens, J., dissenting), rev'd, 417 U. S. 506 (1974). The Court did not read the language this way in *Wilko*, however, and gave two reasons. First, the Court rejected the argument that "arbitration is merely a form of trial to be used in lieu of a trial at law." 346 U. S., at 433. The Court found instead that § 14 does not permit waiver of "the right to select the judicial forum" in favor of arbitration, *id.*, at 435, because "arbitration lacks the certainty of a suit at law under the Act to enforce [the buyer's] rights," *id.*, at 432. Second, the Court concluded that the Securities Act was intended to protect buyers of securities, who often do not deal at arm's length and on equal terms with sellers, by offering them "a wider choice of courts and venue" than is enjoyed by participants in other business transactions, making "the right to select the judicial forum" a particularly valuable feature of the Securities Act. *Id.*, at 435.

We do not think these reasons justify an interpretation of § 14 that prohibits agreements to arbitrate future disputes relating to the purchase of securities. The Court's characterization of the arbitration process in *Wilko* is pervaded by what Judge Jerome Frank called "the old judicial hostility to arbitration." *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978, 985 (CA2 1942). That view has been steadily eroded over the years, beginning in the lower courts. See *Scherk*, *supra*, at 616 (Stevens, J., dissenting) (citing cases). The erosion intensified in our most recent decisions upholding agreements to arbitrate federal claims raised under the Securities Exchange Act of 1934, see *Shear-*

son/American Express Inc. v. *McMahon*, 482 U. S. 220 (1987), under the Racketeer Influenced and Corrupt Organizations (RICO) statutes, see *ibid.*, and under the antitrust laws, see *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614 (1985). See also *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 221 (1985) (federal arbitration statute "requires that we rigorously enforce agreements to arbitrate"); *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 24 (1983) ("[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"). The shift in the Court's views on arbitration away from those adopted in *Wilko* is shown by the flat statement in *Mitsubishi:* "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U. S., at 628. To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.

Once the outmoded presumption of disfavoring arbitration proceedings is set to one side, it becomes clear that the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that § 14 is properly construed to bar any waiver of these provisions. Nor are they so critical that they cannot be waived under the rationale that the Securities Act was intended to place buyers of securities on an equal footing with sellers. *Wilko* identified two different kinds of provisions in the Securities Act that would advance this objective. Some are substantive, such as the provision placing on the seller the burden of proving lack of scienter when a buyer alleges fraud. See 346 U. S., at 431, citing 15 U. S. C. § 77*l*(2). Others are procedural. The specific procedural improvements highlighted in

Wilko are the statute's broad venue provisions in the federal courts; the existence of nationwide service of process in the federal courts; the extinction of the amount-in-controversy requirement that had applied to fraud suits when they were brought in federal courts under diversity jurisdiction rather than as a federal cause of action; and the grant of concurrent jurisdiction in the state and federal courts without possility of removal. See 346 U. S., at 431, citing 15 U. S. C. § 77v(a).

There is no sound basis for construing the prohibition in § 14 on waiving "compliance with any provision" of the Securities Act to apply to these procedural provisions. Although the first three measures do facilitate suits by buyers of securities, the grant of concurrent jurisdiction constitutes explicit authorization for complainants to waive those protections by filing suit in state court without possibility of removal to federal court. These measures, moreover, are present in other federal statutes which have not been interpreted to prohibit enforcement of predispute agreements to arbitrate. See *Shearson/American Express Inc. v. McMahon, supra* (construing the Securities Exchange Act of 1934; see 15 U. S. C. § 78aa); *ibid.* (construing the RICO statutes; see 18 U. S. C. § 1965); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc., supra* (construing the antitrust laws; see 15 U. S. C. § 15).

Indeed, in *McMahon* the Court declined to read § 29(a) of the Securities Exchange Act of 1934, the language of which is in every respect the same as that in § 14 of the 1933 Act, compare 15 U. S. C. § 77v(a) with § 78aa, to prohibit enforcement of predispute agreements to arbitrate. The only conceivable distinction in this regard between the Securities Act and the Securities Exchange Act is that the former statute allows concurrent federal-state jurisdiction over causes of action and the latter statute provides for exclusive federal jurisdiction. But even if this distinction were thought to make any difference at all, it would suggest that arbitration agreements, which are "in effect, a specialized kind of forum-selection clause," *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 519 (1974), should not be prohibited under the Securities Act, since they, like the provision for concurrent jurisdiction, serve to advance the objective of allowing buyers of securities a broader right to select the forum for resolving disputes, whether it be judicial or otherwise. And in *McMahon* we explained at length why we rejected the *Wilko* Court's aversion to arbitration as a forum for resolving disputes over securities transactions, especially in light of the relatively recent expansion of the Securities and Exchange Commission's authority to oversee and to regulate those arbitration procedures. 482 U. S., at 231–234. We need not repeat those arguments here.

Finally, in *McMahon* we stressed the strong language of the Arbitration Act, which declares as a matter of federal law that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2. Under that statute, the party opposing arbitration carries the burden of showing that Congress intended in a separate statute to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes of that other statute. 482 U. S., at 226–227. But as Justice Frankfurter said in dissent in *Wilko*, so it is true in this case: "There is nothing in the record before us, nor in the facts of which we can take judicial notice, to indicate that the arbitral system . . . would not afford the plaintiff the rights to which he is entitled." 346 U. S., at 439. Petitioners have not carried their burden of showing that arbitration agreements are not enforceable under the Securities Act.

The language quoted above from §2 of the Arbitration Act also allows the courts to give relief where the party opposing arbitration presents "well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Mitsubishi*, 473 U. S., at 627. This avenue of relief is in harmony with the Securities Act's concern to protect buyers of securities by removing "the disadvantages under which buyers labor" in their dealings with sellers. *Wilko*, *supra*, at 435. Although petitioners suggest that the agreement to arbitrate here was adhesive in nature, the record contains no factual showing sufficient to support that suggestion.

III

We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing *Wilko*. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions. We now conclude that *Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions. Although we are normally and properly reluctant to overturn our decisions construing statutes, we have done so to achieve a uniform interpretation of similar statutory language, *Commissioner* v. *Estate of Church*, 335 U. S. 632, 649–650 (1949), and to correct a seriously erroneous interpretation of statutory language that would undermine congressional policy as expressed in other legislation, see, *e. g.*, *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235, 240–241 (1970) (overruling *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962)). Both purposes would be served here by overruling the *Wilko* decision.

It also would be undesirable for the decisions in *Wilko* and *McMahon* to continue to exist side by side. Their inconsistency is at odds with the principle that the 1933 and 1934 Acts should be construed harmoniously because they "constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 206 (1976). In this case, for example, petitioners' claims under the 1934 Act were subjected to arbitration, while their claim under the 1933 Act was not permitted to go to arbitration, but was required to proceed in court. That result makes little sense for similar claims, based on similar facts, which are supposed to arise within a single federal regulatory scheme. In addition, the inconsistency between *Wilko* and *McMahon* undermines the essential rationale for a harmonious construction of the two statutes, which is to discourage litigants from manipulating their allegations merely to cast their claims under one of the securities laws rather than another. For all of these reasons, therefore, we overrule the decision in *Wilko*.

Petitioners argue finally that if the Court overrules *Wilko*, it should not apply its ruling retroactively to the facts of this case. We disagree. The general rule of long standing is that the law announced in the Court's decision controls the case at bar. See, *e. g.*, *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604, 608 (1987); *United States* v. *Schooner Peggy*, 1 Cranch 103, 109 (1801). In some civil cases, the Court has restricted its rulings to have prospective application only, where specific circumstances are present. *Chevron Oil* v. *Huson*, 404 U. S. 97, 106–107 (1971). Under the *Chevron* approach, the customary rule of retroactive application is appropriate here. Although our decision to overrule *Wilko* establishes a new principle of law for arbitration agreements under the Securities Act, this ruling furthers the purposes and effect of the Arbitration Act without undermining those of the Securities Act. Today's ruling, moreover, does not produce "substantial inequitable results," 404 U. S., at 107, for petitioners do not make any serious allegation that they agreed to arbitrate future disputes relating to their investment contracts in reliance on *Wilko*'s holding that such agreements would be held unenforceable by the courts. Our conclusion is reinforced by our assessment that resort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

The Court of Appeals refused to follow *Wilko* v. *Swan*, 346 U. S. 427 (1953), a controlling precedent of this Court. As the majority correctly acknowledges, *ante*, at 484, the Court of Appeals therefore engaged in an indefensible brand of judicial activism.[1] We, of course, are not subject to the same restraint when asked to upset one of our own precedents. But when our earlier opinion gives a statutory provision concrete meaning, which Congress elects not to amend during the ensuing 3½ decades, our duty to respect Congress' work product is strikingly similar to the duty of other federal courts to respect our work product.[2]

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[1] After the Court decided *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220 (1987), numerous District Courts also deviated from the rule established in *Wilko* v. *Swan*, and enforced predispute arbitration clauses in suits brought pursuant to the Securities Act of 1933. *E. g.*, *Reed* v. *Bear, Stearns & Co.*, 698 F. Supp. 835 (Kan. 1988); *Ryan* v. *Liss, Tenner & Goldberg Securities Corp.*, 683 F. Supp. 480 (NJ 1988); *Kavouras* v. *Visual Products Systems, Inc.*, 680 F. Supp. 205 (WD Pa. 1988); *Aronson* v. *Dean Witter Reynolds, Inc.*, 675 F. Supp. 1324 (SD Fla. 1987); *DeKuyper* v. *A. G. Edwards & Sons, Inc.*, 695 F. Supp. 1367 (Conn. 1987); *Rosenblum* v. *Drexel Burnham Lambert Inc.*, 700 F. Supp. 874 (ED La. 1987); *Staiman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 673 F. Supp. 1009 (CD Cal. 1987).

[2] Cf. *McMahon*, 482 U. S., at 268 (STEVENS, J., concurring in part and dissenting in part) ("[A]fter a statute has been construed . . . by this Court . . . it acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself. This position reflects both respect for Congress' role, see *Boys Market, Inc.* v. *Retail Clerks*, 398 U. S. 235, 257–258 (1970) (Black, J., dissenting), and the compelling need to preserve

In the final analysis, a Justice's vote in a case like this depends more on his or her views about the respective lawmaking responsibilities of Congress and this Court than on conflicting policy interests. Judges who have confidence in their own ability to fashion public policy are less hesitant to change the law than those of us who are inclined to give wide latitude to the views of the voters' representatives on nonconstitutional matters. Cf. *Boyle* v. *United Technologies Corp.*, 487 U. S. 500 (1988). As I pointed out years ago, *Alberto-Culver Co.* v. *Scherk*, 484 F. 2d 611, 615–620 (CA7 1973) (dissenting opinion), rev'd, 417 U. S. 506 (1974), there are valid policy and textual arguments on both sides regarding the interrelation of federal securities and arbitration Acts.[3] See *ante*, at 479–484. None of these arguments, however, carries sufficient weight to tip the balance between judicial and legislative authority and overturn an interpretation of an Act of Congress that has been settled for many years.

I respectfully dissent.

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the courts' limited resources, see B. Cardozo, The Nature of the Judicial Process 149 (1921)").

[3] Indeed the Court first debated some of these arguments in the precedent-setting opinion that the majority now overrules. Compare *Wilko*, 346 U. S., at 432–438, with *id.*, at 439–440 (Frankfurter, J., dissenting). Most recently they were revisited in *McMahon*, *supra*, an action based upon the Securities Exchange Act of 1934. Compare 482 U. S., at 225–238, with *id.*, at 243–266 (BLACKMUN, J., concurring in part and dissenting in part).

MALENG, KING COUNTY PROSECUTING ATTORNEY, ET AL. *v.* COOK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88–357. Argued March 27, 1989—Decided May 15, 1989

As the result of a 1958 conviction in a Washington state court, respondent Cook served a sentence that expired by its terms in 1978. Subsequently, he was convicted of other state crimes, and, in 1978, he was sentenced to two life terms and one 10-year term. Under state law, the 1958 conviction will increase by several years the mandatory minimum term that he will have to serve on his 1978 sentences. He is currently serving a term in federal prison for certain federal crimes and will begin serving his 1978 state sentences when his federal prison term expires. While in federal prison, Cook filed a *pro se* petition for habeas corpus relief in the Federal District Court, alleging that his 1958 conviction was invalid and thus had been used illegally to enhance the 1978 sentences which he had not yet begun to serve. The court dismissed the petition, holding that, because the 1958 sentence had expired, Cook was not "in custody"—as required by 28 U. S. C. § 2241(c)(3)—for the purposes of a habeas attack on the 1958 conviction. The Court of Appeals reversed, holding that he was "in custody" on the 1958 conviction because it had been used to enhance his 1978 sentences.

Held: Cook is not presently "in custody" under the 1958 sentence, but he is "in custody" under the 1978 sentences. Although a prisoner need not be physically confined in order to challenge his sentence on habeas corpus, once a sentence has completely expired, the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent convictions is not itself sufficient to render an individual "in custody." See *Carafas* v. *LaVallee*, 391 U. S. 234. However, Cook can challenge the 1978 sentences. While he is not physically confined under those sentences, the fact that the State has placed a detainer with the federal authorities to ensure that he will be returned to the State authorities at the conclusion of his federal sentence is sufficient to put him "in custody" for habeas purposes. See *Peyton* v. *Rowe*, 391 U. S. 54; *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484. And Cook's habeas petition, construed with the deference to which *pro se* litigants are entitled, can be read as asserting a challenge to the 1978 sentences as enhanced by the allegedly invalid prior conviction.

847 F. 2d 616, affirmed.

Kenneth O. Eikenberry, Attorney General of Washington, argued the cause for petitioners. With him on the briefs were *William L. Williams*, Senior Assistant Attorney General, and *John M. Jones*, Assistant Attorney General.

John B. Midgley argued the cause and filed a brief for respondent.*

PER CURIAM.

In 1958, respondent was convicted of robbery in Washington state court and sentenced to 20 years of imprisonment; this sentence expired by its terms in 1978. In 1976, while on parole from that sentence, he was convicted of two counts of assault and one count of aiding a prisoner to escape; in 1978, the State sentenced him to two life terms and one 10-year term on those convictions. These sentences were maximum terms under Washington's then-indeterminate sentencing scheme, with the minimum term to be set by the Board of Prison Terms and Paroles. Under Washington law, the 1958 conviction will increase by several years the mandatory minimum term which respondent will have to serve on his 1978 sentences.

In 1976 respondent was also convicted of bank robbery and conspiracy in federal court and sentenced to 30 years of imprisonment. He is currently serving his federal sentence in a federal penitentiary in California, but the State of Washington has lodged a detainer against him with federal prison authorities. Respondent is scheduled to begin serving the sentences imposed upon him by the Washington courts in 1978 at the expiration of his federal term.

In 1985, while in federal prison, respondent filed a *pro se* petition for habeas corpus relief in the United States District Court for the Western District of Washington. Respond-

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*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Sheryl Gordon McCloud* and *John A. Powell;* and for the National Legal Aid and Defender Association by *Alan Raphael.*

ent's petition listed the 1958 Washington conviction as the "conviction under attack," alleging that it was invalid because respondent had not been given a competency hearing, even though there was reasonable doubt as to his competency to stand trial. Respondent also alleged that the 1958 conviction had been used illegally to enhance his 1978 state sentences, which he had not yet begun to serve.* The District Court dismissed the petition for lack of subject-matter jurisdiction, holding that respondent was not "in custody" for the purposes of a habeas attack on the 1958 conviction because the sentence imposed for that conviction had already expired. The Court of Appeals for the Ninth Circuit reversed. 847 F. 2d 616 (1988). The Court of Appeals held that respondent was still "in custody" under the 1958 conviction, even though the sentence imposed for that conviction had expired, because it had been used to enhance the sentences imposed in 1978 for his 1976 state convictions, which he had yet to serve. *Id.*, at 618–619. We granted certiorari to review this interpretation of the "in custody" requirement. 488 U. S. 941 (1988). We conclude that respondent is not presently "in custody" under the 1958 sentence, but that he is "in custody" under the 1978 state sentences which he has not yet begun to serve.

The federal habeas statute gives the United States district courts jurisdiction to entertain petitions for habeas relief only from persons who are "*in custody* in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2241(c)(3) (emphasis added); see also 28 U. S. C. § 2254(a). We have interpreted the statutory language as requiring that the habeas petitioner be "in custody" under the conviction or sentence under attack at the time his petition is filed. See *Carafas* v. *LaVallee,* 391 U. S. 234, 238 (1968). In this case, the Court of Appeals held that a habeas petitioner may be "in custody" under a conviction whose sentence has fully expired at the time his petition is filed, simply because that conviction has been used to enhance the length of a current or future sentence imposed for a subsequent conviction. We think that this interpretation stretches the language "in custody" too far.

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*Respondent also alleged that the 1958 conviction had been used to enhance the federal sentence which he was serving at the time of the filing. The courts below did not address that contention, however, and respondent has not pressed it before this Court. Accordingly, we do not consider it here.

Our interpretation of the "in custody" language has not required that a prisoner be physically confined in order to challenge his sentence on habeas corpus. In *Jones* v. *Cunningham,* 371 U. S. 236 (1963), for example, we held that a prisoner who had been placed on parole was still "in custody" under his unexpired sentence. We reasoned that the petitioner's release from physical confinement under the sentence in question was not unconditional; instead, it was explicitly conditioned on his reporting regularly to his parole officer, remaining in a particular community, residence, and job, and refraining from certain activities. *Id.,* at 242; see also *Hensley* v. *Municipal Court, San Jose-Milpitas Judicial Dist., Santa Clara County,* 411 U. S. 345 (1973); *Braden* v. *30th Judicial Circuit Court of Ky.,* 410 U. S. 484 (1973).

We have never held, however, that a habeas petitioner may be "in custody" under a conviction when the sentence imposed for that conviction has *fully expired* at the time his petition is filed. Indeed, our decision in *Carafas* v. *LaVallee, supra,* strongly implies the contrary. In *Carafas,* the petitioner filed his habeas application while he was actually incarcerated under the sentence he sought to attack, but his sentence expired and he was unconditionally discharged from custody while his appeal from the denial of habeas relief below was pending before this Court. The State argued that the unconditional discharge rendered the case moot. We rejected this argument, holding that the "collateral consequences" of the petitioner's conviction—his inability to vote, engage in certain businesses, hold public office, or serve as a juror—prevented the case from being moot. *Id.*, at 237–238. We went on to say, however, that the unconditional release raised a "substantial issue" as to the statutory "in custody" requirement. *Id.*, at 238. While we ultimately found that requirement satisfied as well, we rested that holding *not* on the collateral consequences of the conviction, but on the fact that the petitioner had been in physical custody under the challenged conviction at the time the petition was filed. *Ibid.* The negative implication of this holding is, of course, that once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual "in custody" for the purposes of a habeas attack upon it.

The question presented by this case is whether a habeas petitioner remains "in custody" under a conviction after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted. We hold that he does not. While we have very liberally construed the "in custody" requirement for purposes of federal habeas, we have never extended it to the situation where a habeas petitioner suffers no present restraint from a conviction. Since almost all States have habitual offender statutes, and many States provide as Washington does for specific enhancement of subsequent sentences on the basis of prior convictions, a contrary ruling would mean that a petitioner whose sentence has completely expired could nonetheless challenge the conviction for which it was imposed at any time on federal habeas. This would read the "in custody" requirement out of the statute and be contrary to the clear implication of the opinion in *Carafas* v. *LaVallee*, *supra.*

In this case, of course, the possibility of a sentence upon a subsequent conviction being enhanced because of the prior conviction actually materialized, but we do not think that requires any different conclusion. When the second sentence is imposed, it is pursuant to the second conviction that the petitioner is incarcerated and is therefore "in custody."

We do think, however, that respondent may challenge the sentences imposed upon him by the State of Washington in 1978, even though he is not presently serving them. In *McNally* v. *Hill*, 293 U. S. 131 (1934), we held that the "in custody" requirement meant present physical confinement under the conviction or sentence under attack. Were this rule still the law, respondent would not be "in custody" even under the 1978 sentences, because he has not yet begun to serve them. But in *Peyton* v. *Rowe*, 391 U. S. 54 (1968), we overruled *McNally* and held that a petitioner who was serving two consecutive sentences imposed by the Commonwealth of Virginia could challenge the second sentence which he had not yet begun to serve.

While in this case respondent is serving a federal sentence, rather than another sentence imposed by the State of Washington, we do not think this factual difference from *Peyton* v. *Rowe* requires a different result. The State of Washington has placed a detainer with the federal authorities to ensure that at the conclusion of respondent's federal sentence, he will be returned to the state authorities to begin serving his 1978 state sentences. In *Braden* v. *30th Judicial Circuit Court of Ky.*, *supra*, we held that a prisoner serving a sentence in Alabama, who was subject to a detainer filed with his Alabama jailers by Kentucky officials, was "in custody" for the purpose of a habeas attack on the outstanding Kentucky charge upon which the detainer rested. We think that *Braden* and *Peyton* together require the conclusion that respondent in this case was "in custody" under his 1978 state sentences at the time he filed. Since we think respondent's habeas petition, construed with the deference to which *pro se* litigants are entitled, *Haines* v. *Kerner*, 404 U. S. 519 (1972), can be read as asserting a challenge to the 1978 sentences, as enhanced by the allegedly invalid prior conviction, see *United States* v. *Tucker*, 404 U. S. 443 (1972), we affirm the Court of

Appeals' finding that respondent has satisfied the "in custody" requirement for federal habeas jurisdiction.

Our holding is limited to the narrow issue of "custody" for subject-matter jurisdiction of the habeas court. We express no view on the extent to which the 1958 conviction itself may be subject to challenge in the attack upon the 1978 sentences which it was used to enhance. See 28 U. S. C. § 2254 Rule 9(a).

The judgment of the Court of Appeals is

Affirmed.

LAURO LINES S.R.L. *v.* CHASSER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 88–23. Argued April 17, 1989—Decided May 22, 1989

Respondents—passengers and representatives of the estates of passengers on a cruise ship hijacked by terrorists—filed suit in the District Court against petitioner, the ship's owner, to recover damages for personal injuries and for the wrongful death of one passenger. Before trial, petitioner moved to dismiss the actions, citing the forum-selection clause printed on each passenger ticket, which purported to obligate passengers to institute any suit in connection with the contract in Italy and to renounce the right to sue elsewhere. The District Court denied the motions, holding that the ticket did not give passengers reasonable notice that they were waiving the opportunity to sue in a domestic forum. The Court of Appeals dismissed petitioner's appeal on the ground that the District Court's dismissal orders were interlocutory and not appealable under 28 U. S. C. § 1291, holding that the orders did not fall within the exception to the rule of nonappealability carved out by the collateral order doctrine.

Held: An interlocutory order denying a defendant's motion to dismiss a damages action on the basis of a contractual forum-selection clause is not immediately appealable under § 1291. Such an order is not final in the usual sense, for it does not end the litigation on the merits but, on the contrary, ensures that the litigation will continue. Nor does the order fall within the narrow exception to the normal application of the final judgment rule known as the collateral order doctrine, for the order is not effectively unreviewable on appeal from final judgment. The right to be sued only in a particular forum, as compared to the right to avoid suit altogether, although not perfectly secured by an appeal after final judgment, is sufficiently vindicable at that stage and is not essentially destroyed if vindication is postponed until trial is completed. Moreover, the costs associated with unnecessary litigation, should it eventually be decided that the District Court erred in trying the case, do not warrant allowing an immediate appeal of a pretrial order. That there may be a policy favoring enforcement of foreign forum-selection clauses goes to the merits of petitioner's claim that its ticket agreement requires that suit be filed in Italy and that the agreement should be enforced by the federal courts, but does not affect the appealability of a prejudgment order, which turns on the contours of the right asserted, not on the likelihood of eventual success on the merits. Pp. 497–501.

844 F. 2d 50, affirmed.

BRENNAN, J., delivered the opinion for a unanimous Court. SCALIA, J., filed a concurring opinion, *post*, p. 502.

Raymond A. Connell argued the cause for petitioner. With him on the briefs were *John R. Geraghty* and *LeRoy Lambert*. *Daniel J. Dougherty* filed a brief for Chandris, Inc., respondent under this Court's Rule 19.6 in support of petitioner.

Arnold I. Burns argued the cause for respondents. On the brief were *Morris J. Eisen* and *William P. Larsen, Jr.*

JUSTICE BRENNAN delivered the opinion of the Court.

We granted certiorari to consider whether an interlocutory order of a United States District Court denying a defendant's motion to dismiss a damages action on the basis of a contractual forum-selection clause is immediately appealable under 28 U. S. C. § 1291 as a collateral final order. We hold that it is not.

I

The individual respondents were, or represent the estates of persons who were, passengers aboard the cruise ship Achille Lauro when it was hijacked by terrorists in the Mediterranean in October 1985. Petitioner Lauro Lines s.r.l., an Italian company, owns the Achille Lauro. Respondents filed suits against Lauro Lines in the District Court for the Southern District of New York to recover damages for injuries sustained as a result of the hijacking and for the wrongful death of passenger Leon Klinghoffer. Lauro Lines moved before trial to dismiss the actions, citing the forum-selection clause printed on each passenger ticket. This clause purported to obligate the passenger to institute any suit arising in connection with the contract in Naples, Italy, and to renounce the right to sue elsewhere.

The District Court denied petitioner's motions to dismiss, holding that the ticket as a whole did not give reasonable notice to passengers that they were waiving the opportunity to sue in a domestic forum. Without moving for certification for immediate appeal pursuant to 28 U. S. C. § 1292(b), Lauro Lines sought to appeal the District Court's orders. The Court of Appeals for the Second Circuit dismissed petitioner's appeal on the ground that the District Court's orders denying petitioner's motions to dismiss were interlocutory and not appealable under § 1291. The court held that the orders did not fall within the exception to the rule of nonappealability carved out for collateral final orders in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). 844 F. 2d 50 (1988). We granted certiorari to resolve a disagreement among the Courts of Appeals. 488 U. S. 887 (1988). Compare, *e. g.*, 844 F. 2d 50 (1988) (case below); *Rohrer, Hibler & Replogle, Inc.* v. *Perkins*, 728 F. 2d 860, 862–863 (CA7) (holding prejudgment denial of motion to dismiss on basis of forum-selection clause not to be immediately appealable under § 1291), cert. denied, 469 U. S. 890 (1984), with *Hodes* v. *S. N. C. Achille Lauro ed Altri-Gestione*, 858 F. 2d 905, 908 (CA3 1988), cert. dism'd, 490 U. S. 1001 (1989); *Sterling Forest Associates, Ltd.* v. *Barnett-Range Corp.*, 840 F. 2d 249, 253 (CA4 1988); *Farmland Industries, Inc.* v. *Frazier-Parrott Commodities, Inc.*, 806 F. 2d 848, 851 (CA8 1986) (holding such denial to be an immediately appealable collateral final order). We now affirm.

II

Title 28 U. S. C. § 1291 provides for appeal to the courts of appeals only from "final decisions of the district courts of the United States." For purposes of § 1291, a final judgment is generally regarded as "a decision by the district court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Van Cauwenberghe* v. *Biard*, 486 U. S. 517, 521 (1988), quoting *Catlin* v. *United*

States, 324 U. S. 229, 233 (1945). An order denying a motion to dismiss a civil action on the ground that a contractual forum-selection clause requires that such suit be brought in another jurisdiction is not a decision on the merits that ends the litigation. On the contrary, such an order "ensures that litigation will continue in the District Court." *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 275 (1988). Section 1291 thus permits an appeal only if an order denying a motion to dismiss based upon a forum-selection clause falls within the "narrow exception to the normal application of the final judgment rule [that] has come to be known as the collateral order doctrine." *Midland Asphalt Corp.* v. *United States*, 489 U. S. 794, 798 (1989). That exception is for a "small class" of prejudgment orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, [and that are] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, *supra*, at 546. We have held that to fall within the *Cohen* exception, an order must satisfy at least three conditions: "It must 'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.'" *Richardson-Merrell Inc.* v. *Koller*, 472 U. S. 424, 431 (1985), quoting *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978). For present purposes, we need not decide whether an order denying a dismissal motion based upon a contractual forum-selection clause conclusively determines a disputed issue, or whether it resolves an important issue that is independent of the merits of the action, for the District Court's orders fail to satisfy the third requirement of the collateral order test.

We recently reiterated the "general rule" that an order is "effectively unreviewable" only "where the order at issue involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'" *Midland Asphalt Corp., supra,* at 798, quoting *United States* v. *MacDonald,* 435 U. S. 850, 860 (1978). If it is eventually decided that the District Court erred in allowing trial in this case to take place in New York, petitioner will have been put to unnecessary trouble and expense, and the value of its contractual right to an Italian forum will have been diminished. It is always true, however, that "there is value . . . in triumphing before trial, rather than after it," *MacDonald, supra,* at 860, n. 7, and this Court has declined to find the costs associated with unnecessary litigation to be enough to warrant allowing the immediate appeal of a pretrial order, see *Richardson-Merrell Inc., supra,* at 436 ("[T]he possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress" in § 1291). Instead, we have insisted that the right asserted be one that is essentially destroyed if its vindication must be postponed until trial is completed.

We have thus held in cases involving criminal prosecutions that the deprivation of a right *not to be tried* is effectively unreviewable after final judgment and is immediately appealable. *Helstoski* v. *Meanor,* 442 U. S. 500 (1979) (denial of motion to dismiss under the Speech or Debate Clause); *Abney* v. *United States,* 431 U. S. 651 (1977) (denial of motion to dismiss on double jeopardy grounds). See *Midland Asphalt Corp., supra,* at 801 ("A right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit statutory or constitutional guarantee *that trial will not occur*") (emphasis added). Similarly, in civil cases, we have held that the denial of a motion to dismiss based upon a claim of absolute immunity from suit is immediately appealable prior to final judgment, *Nixon* v. *Fitzgerald,* 457 U. S. 731, 742–743 (1982), "for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action," *Mitchell* v. *Forsyth*, 472 U. S. 511, 525 (1985). And claims of qualified immunity may be pursued by immediate appeal, because qualified immunity too "is an *immunity from suit*." *Id.*, at 526 (emphasis in original).

On the other hand, we have declined to hold the collateral order doctrine applicable where a district court has denied a claim, not that the defendant has a right not to be sued at all, but that the suit against the defendant is not properly before the particular court because it lacks jurisdiction. In *Van Cauwenberghe* v. *Biard*, 486 U. S. 517 (1988), a civil defendant moved for dismissal on the ground that he had been immune from service of process because his presence in the United States had been compelled by extradition to face criminal charges. We noted that, after *Mitchell*, "[t]he critical question . . . is whether 'the essence' of the claimed right is a right not to stand trial," 486 U. S., at 524, and held that the immunity from service of process defendant asserted did not amount to an immunity from suit—even though service was essential to the trial court's jurisdiction over the defendant. See also *Catlin* v. *United States*, 324 U. S., at 236 (order denying motion to dismiss petition for condemnation of land not immediately appealable, "even when the motion is based upon jurisdictional grounds").

Lauro Lines argues here that its contractual forum-selection clause provided it with a right to trial before a tribunal in Italy, and with a concomitant right not to be sued anywhere else. This "right not to be haled for trial before tribunals outside the agreed forum," petitioner claims, cannot effectively be vindicated by appeal after trial in an improper forum. Brief for Petitioner 38–39. There is no obviously correct way to characterize the right embodied in petitioner's forum-selection provision: "all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial." *Van Cauwenberghe*, *supra*, at 524. The right appears most like the right to be free from trial if it is characterized—as by petitioner—as a right not to be sued at all except in a Neapolitan forum. It appears less like a right not to be subjected to suit if characterized—as by the Court of Appeals—as "a right to have the binding adjudication of claims occur in a certain forum." 844 F. 2d, at 55. Cf. *Van Cauwenberghe, supra,* at 526–527. Even assuming that the former characterization is proper, however, petitioner is obviously not entitled under the forum-selection clause of its contract to avoid suit altogether, and an entitlement to avoid suit is different in kind from an entitlement to be sued only in a particular forum. Petitioner's claim that it may be sued only in Naples, while not perfectly secured by appeal after final judgment, is adequately vindicable at that stage—surely as effectively vindicable as a claim that the trial court lacked personal jurisdiction over the defendant—and hence does not fall within the third prong of the collateral order doctrine.

Petitioner argues that there is a strong federal policy favoring the enforcement of foreign forum-selection clauses, citing *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1 (1972), and that "the essential concomitant of this strong federal policy . . . is the right of immediate appellate review of district court orders denying their enforcement." Brief for Petitioner 40–41. A policy favoring enforcement of forum-selection clauses, however, would go to the merits of petitioner's claim that its ticket agreement requires that any suit be filed in Italy and that the agreement should be enforced by the federal courts. Immediate appealability of a prejudgment order denying enforcement, insofar as it depends upon satisfaction of the third prong of the collateral order test, turns on the precise contours of the right asserted, and not upon the likelihood of eventual success on the merits. The Court of Appeals properly dismissed petitioner's appeal, and its judgment is

Affirmed.

JUSTICE SCALIA, concurring.

I join the opinion of the Court and write separately only to make express what seems to me implicit in its analysis.

The reason we say that the right not to be sued elsewhere than in Naples is "adequately vindicable," *ante*, at 501, by merely reversing any judgment obtained in violation of it is, quite simply, that the law does not deem the right *important enough* to be vindicated by, as it were, an injunction against its violation obtained through interlocutory appeal. The importance of the right asserted has always been a significant part of our collateral order doctrine. When first formulating that doctrine in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), we said that it permits interlocutory appeal of final determinations of claims that are not only "separable from, and collateral to, rights asserted in the action," but also, we immediately added, "*too important* to be denied review." *Id.*, at 546 (emphasis added). Our later cases have retained that significant requirement. For example, in *Abney* v. *United States*, 431 U. S. 651 (1977), we said that in order to qualify for immediate appeal the order must involve "an *important* right which would be 'lost, probably irreparably,' if review had to await final judgment." *Id.*, at 658 (emphasis added), quoting *Cohen*, *supra*, at 546. And in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978), we said that the order must "resolve an *important* issue completely separate from the merits of the action." *Id.*, at 468 (emphasis added). See also *Van Cauwenberghe* v. *Biard*, 486 U. S. 517, 522–527 (1988); *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 276–277 (1988); *Richardson-Merrell Inc.* v. *Koller*, 472 U. S. 424, 431 (1985); *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 12 (1983); *Nixon* v. *Fitzgerald*, 457 U. S. 731, 742 (1982).

While it is true, therefore, that the "right not to be sued elsewhere than in Naples" is not fully vindicated—indeed, to be utterly frank, is positively destroyed—by permitting the trial to occur and reversing its outcome, that is vindication enough because the right is not sufficiently important to overcome the policies militating against interlocutory appeals. We have made that judgment when the right not to be tried in a particular court has been created through jurisdictional limitations established by Congress or by international treaty, see *Van Cauwenberghe, supra.* The same judgment applies—if anything, *a fortiori*—when the right has been created by private agreement.

GREEN *v.* BOCK LAUNDRY MACHINE CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87-1816. Argued January 18, 1989—Decided May 22, 1989

In petitioner Green's product liability action against respondent Bock, the manufacturer of a machine that injured Green, Bock impeached Green's testimony by eliciting admissions that he had previously been convicted of burglary and a related felony. After the jury returned a verdict for Bock, Green argued on appeal that the District Court had erred by denying his pretrial motion to exclude the impeaching evidence. The Court of Appeals summarily affirmed the District Court's ruling, following Circuit precedent established in *Diggs* v. *Lyons*, 741 F. 2d 577. *Diggs* held, *inter alia*, that Rule 609(a)(1) of the Federal Rules of Evidence—which specifies that evidence that a witness has been convicted of a felony "shall" be admitted for the purpose of attacking the witness' credibility "only if" the court determines that the probativeness of the evidence outweighs its prejudice "to the defendant"—mandates admission for impeachment purposes of a civil plaintiff's prior felony convictions, and that the Rule's specific command forecloses the judicial exercise of discretion under Rule 403, which authorizes the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice.

Held: Rule 609(a)(1) requires a judge to permit impeachment of a civil witness with evidence of prior felony convictions regardless of ensuant unfair prejudice to the witness or the party offering the testimony. Thus, the District Court did not err in allowing the jury to learn through impeaching cross-examination that Green was a convicted felon. Pp. 509–527.

(a) The Rule's text is ambiguous with respect to its applicability in civil cases. By using the restrictive phrase "to the defendant," the Rule's plain language appears not only to command the weighing of prejudice to a civil defendant, but also to compel the automatic admissibility of prior felony conviction evidence detrimental to a civil plaintiff. An interpretation that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants a civil defendant is unacceptable; therefore, the Rule cannot mean what it says as far as civil trials are concerned. Pp. 509–511.

(b) The history leading to enactment of the Rule as law establishes that Congress intended that only the accused in a criminal case should be protected from unfair prejudice by the balancing requirement set out in Rule 609(a)(1). Pp. 511–524.

(c) Rule 609(a)(1)'s exclusion of civil witnesses from its weighing language is a specific and mandatory command that impeachment of such witnesses be admitted into evidence, which command overrides a judge's general discretionary authority under Rule 403 to balance probative value against prejudice. Pp. 524–526.

845 F. 2d 1011, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 527. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 530.

Joseph M. Melillo argued the cause for petitioner. With him on the briefs was *Neil J. Rovner*.

Thomas D. Caldwell, Jr., argued the cause for respondent. With him on the brief was *Richard B. Swartz*.*

JUSTICE STEVENS delivered the opinion of the Court.

This case presents the question whether Rule 609(a)(1) of the Federal Rules of Evidence requires a judge to let a civil litigant impeach an adversary's credibility with evidence of the adversary's prior felony convictions. Because the Courts of Appeals have answered that question in different ways, we granted certiorari to resolve the conflict. 487 U. S. 1203 (1988).

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*A brief of *amici curiae* urging affirmance was filed for the Commonwealth of Pennsylvania et al. by *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Gregory R. Neuhauser*, Senior Deputy Attorney General, and *John G. Knorr III*, Chief Deputy Attorney General, *Robert Butterworth*, Attorney General of Florida, *Linley E. Pearson*, Attorney General of Indiana, *Stephen E. Merrill*, Attorney General of New Hampshire, *Nicholas Spaeth*, Attorney General of North Dakota, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *T. Travis Medlock*, Attorney General of South Carolina, *W. J. Michael Cody*, Attorney General of Tennessee, *Rosalie Simmonds Ballentine*, Solicitor General of the Virgin Islands, *Donald J. Hanaway*, Attorney General of Wisconsin, and *Joseph B. Meyer*, Attorney General of Wyoming.

While in custody at a county prison, petitioner Paul Green obtained work-release employment at a car wash. On his sixth day at work, Green reached inside a large dryer to try to stop it. A heavy rotating drum caught and tore off his right arm. Green brought this product liability action against respondent Bock Laundry Co. (Bock), manufacturer of the machine. At trial Green testified that he had been instructed inadequately concerning the machine's operation and dangerous character. Bock impeached Green's testimony by eliciting admissions that he had been convicted of conspiracy to commit burglary and burglary, both felonies. The jury returned a verdict for Bock. On appeal Green argued that the District Court had erred by denying his pretrial motion to exclude the impeaching evidence. The Court of Appeals summarily affirmed the District Court's ruling. 845 F. 2d 1011 (1988).

The Court of Appeals' disposition followed Circuit precedent established in *Diggs* v. *Lyons*, 741 F. 2d 577 (CA3 1984), cert. denied, 471 U. S. 1078 (1985). Writing for the panel majority, Judge Maris, who had headed the Advisory Committee that proposed a federal code of evidence to this Court,[1] concluded in *Diggs* that Rule 609 mandated admission for impeachment purposes of a civil plaintiff's prior felony convictions. He relied on the legislative history of Rule 609 as establishing that Congress intended Rule 609 to govern both criminal and civil proceedings. 741 F. 2d, at 581. He also concluded that a judge may not balance prejudice and probativeness pursuant to Rule 403[2] in order to circumvent Rule

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[1] See Preliminary Draft of Proposed Rules of Evidence, 46 F. R. D. 161, 162 (1969).

[2] Federal Rule of Evidence 403 provides:

"Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

609(a)(2)'s requirement that all convictions pertaining to dishonesty—often called *crimen falsi* evidence—be admitted. *Ibid.* Rule 609's specific command, he wrote, forecloses judicial exercise of Rule 403 discretion to exclude evidence of felony convictions. *Id.*, at 582. The only situation in which Rule 609(a) allows the trial judge discretion to bar impeachment by prior felony convictions is when admission would unduly prejudice the defendant in a criminal case.[3] *Ibid.* Judge Maris concluded with this comment:

> "[T]he scope of Rule 609 has been and is the subject of widespread controversy and strongly held divergent views. We have felt compelled to give the rule the effect which the plain meaning of its language and the legislative history require. We recognize that the mandatory admission of all felony convictions on the issue of credibility may in some cases produce unjust and even bizarre results. Evidence that a witness has in the past been convicted of manslaughter by automobile, for example, can have but little relevance to his credibility as a witness in a totally different matter. But if the rule is to be amended to eliminate these possibilities of injustice, it must be done by those who have the authority to amend the rules, the Supreme Court and the Congress . . . . It is not for us as enforcers of the rule to amend it under the guise of construing it." *Ibid.*

Dissenting, Judge Gibbons acknowledged that "snippets of legislative history" show that four Members of Congress anticipated that a court might interpret Rule 609(a) to require impeachment of a witness by prior felony convictions irrelevant to the civil context. *Id.*, at 583. Yet he remained unpersuaded that Congress as a whole intended "so ridiculous a result." *Ibid.* Instead, he attributed the Rules' silence regarding impeachment of civil plaintiffs to "legislative oversight." *Ibid.* And he noted that other Circuits had concluded, contrary to the panel majority, "that the mandatory admission feature of prior *crimen falsi* convictions does not apply to the admissibility of prior felony convictions in civil cases." *Ibid.* Placing the use of prior felony conviction evidence outside the reach of the judge's discretion, he declared, "makes no sense whatever." *Ibid.*

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[3] Although Rule 609(b) confers discretion upon the judge regarding the admission of convictions more than 10 years old, that factor was not present in *Diggs* or in this case.

Both the majority and dissenting opinions in *Diggs* convey dissatisfaction with automatic admissibility of prior felony convictions to impeach civil witnesses, especially civil plaintiffs. Indeed, criticism of this result is longstanding and widespread.[4] Our task in deciding this case, however, is not to fashion the rule we deem desirable but to identify the rule that Congress fashioned. We begin by considering the extent to which the text of Rule 609 answers the question before us. Concluding that the text is ambiguous with respect to civil cases, we then seek guidance from legislative history and from the Rules' overall structure.

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[4] More than a century ago, Oliver Wendell Holmes, Jr., then a Justice on the Supreme Judicial Court of Massachusetts, wrote in a civil case:

"[W]hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit." *Gertz* v. *Fitchburg Railroad Co.*, 137 Mass. 77, 78 (1884).

Questions about the relevancy and fairness of such evidence did not abate, see n. 11, *infra*, and persisted even after enactment in 1975 of the Federal Rules of Evidence. *E. g., Shows* v. *M/V Red Eagle*, 695 F. 2d 114, 118 (CA5 1983); 10 J. Moore & H. Bendix, Moore's Federal Practice § 609.02, pp. VI-134 to VI-135 (2d ed. 1988) (hereinafter Moore); 3 D. Louisell & C. Mueller, Federal Evidence § 315, pp. 316–319 (1979) (hereinafter Louisell); Foster, Rule 609(a) in the Civil Context: A Recommendation for Reform, 57 Ford. L. Rev. 1 (1988); Note, Prior Convictions Offered for Impeachment in Civil Trials: The Interaction of Federal Rules of Evidence 609(a) and 403, 54 Ford. L. Rev. 1063 (1986).

I

Federal Rule of Evidence 609(a) provides:

> "General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment."

By its terms the Rule requires a judge to allow impeachment of any witness with prior convictions for felonies not involving dishonesty "only if" the probativeness of the evidence is greater than its prejudice "to the defendant."[5] *Ibid.* It follows that impeaching evidence detrimental to the prosecution in a criminal case "shall be admitted" without any such balancing. *Ibid.*

The Rule's plain language commands weighing of prejudice to a defendant in a civil trial as well as in a criminal trial. But that literal reading would compel an odd result in a case like this. Assuming that all impeaching evidence has at least minimal probative value, and given that the evidence of plaintiff Green's convictions had some prejudicial effect on his case—but surely none on defendant Bock's—balancing according to the strict language of Rule 609(a)(1) inevitably leads to the conclusion that the evidence was admissible. In fact, under this construction of the Rule, impeachment detrimental to a civil plaintiff always would have to be admitted.

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[5] Thus the text of the Rule limits impeachment of not only a criminal defendant, but also any witness offered on the defendant's behalf. Cf. S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 364–365 (3d ed. 1982) (hereinafter Saltzburg) (suggesting Congress may not have intended this result).

No matter how plain the text of the Rule may be, we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to a civil defendant.[6] The Sixth Amendment to the Constitution guarantees a criminal defendant certain fair trial rights not enjoyed by the prosecution, while the Fifth Amendment lets the accused choose not to testify at trial. In contrast, civil litigants in federal court share equally the protections of the Fifth Amendment's Due Process Clause. Given liberal federal discovery rules, the inapplicability of the Fifth Amendment's protection against self-incrimination, and the need to prove their case, civil litigants almost always must testify in depositions or at trial. Denomination as a civil defendant or plaintiff, moreover, is often happenstance based on which party filed first or on the nature of the suit.[7] Evidence that a litigant or his witness is a convicted felon tends to shift a jury's focus from the worthiness of the litigant's position to the moral worth of the litigant himself.[8] It is unfathomable why a civil plaintiff—but not a civil defendant—should be subjected to this risk. Thus we agree with the Seventh Circuit that as far as civil trials are concerned, Rule 609(a)(1) "can't mean what it says."[9] *Campbell* v. *Greer*, 831 F. 2d 700, 703 (1987).

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[6] Courts considering admissibility of impeachment harmful to a civil *defendant* occasionally have allowed balancing without questioning Rule 609(a)'s asymmetry when applied to the civil context. *E. g.*, *Murr* v. *Stinson*, 752 F. 2d 233 (CA6 1985) *(per curiam); Calhoun* v. *Baylor*, 646 F. 2d 1158 (CA6 1981).

[7] Cf. *Campbell* v. *Greer*, 831 F. 2d 700, 703 (CA7 1987). Declaratory judgment and interpleader actions, for instance, may invert expected designations of plaintiff and defendant. See 28 U. S. C. § 2201 (1982 ed., Supp. V); Fed. Rule Civ. Proc. 22.

[8] See *Shows*, 695 F. 2d, at 118 (prior felony impeachment of plaintiff alleging injuries because of employer's negligence "presented the risk that a jury would not be fair to Shows' claim, not because it did not believe him, but because as a convict he was not deserving of their justice"). See also Foster, 57 Ford. L. Rev., at 5, 21–22; Note, 54 Ford. L. Rev., at 1067.

Out of this agreement flow divergent courses, each turning on the meaning of "defendant." The word might be interpreted to encompass all witnesses, civil and criminal, parties or not. See *Green* v. *Shearson Lehman/American Express, Inc.*, 625 F. Supp. 382, 383 (ED Pa. 1985) (dictum). It might be read to connote any party offering a witness, in which event Rule 609(a)(1)'s balance would apply to civil, as well as criminal, cases. *E. g., Howard* v. *Gonzales*, 658 F. 2d 352 (CA5 1981). Finally, "defendant" may refer only to the defendant in a criminal case. See, *e. g., Campbell*, 831 F. 2d, at 703. These choices spawn a corollary question: must a judge allow prior felony impeachment of all civil witnesses as well as all criminal prosecution witnesses, or is Rule 609(a)(1) inapplicable to civil cases, in which event Rule 403 would authorize a judge to balance in such cases? Because the plain text does not resolve these issues, we must examine the history leading to enactment of Rule 609 as law.

II

At common law a person who had been convicted of a felony was not competent to testify as a witness. "[T]he disqualification arose as part of the punishment for the crime, only later being rationalized on the basis that such a person was unworthy of belief." 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶609[02], p. 609–58 (1988) (citing 2 J. Wigmore, Evidence §519 (3d ed. 1940)). As the law evolved, this absolute bar gradually was replaced by a rule that allowed such witnesses to testify in both civil and criminal cases, but also to be impeached by evidence of a prior felony conviction or a *crimen falsi* misdemeanor conviction.[10] In the face of scholarly criticism of automatic admission of such impeaching evidence, some courts moved toward a more flexible approach.[11]

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[9] Accord, Moore §609.14[4], at VI–148 ("[S]ubsection (a)(1) is deficient, in that it cannot be sensibly applied in civil cases"); Louisell §316, at 324, n. 26 ("It would be incongruous to read the provision as allowing exclusion of convictions of defendants in civil cases, since no reason appears to distinguish among the parties in civil litigation").

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[10] See, *e. g.*, Moore § 609.02, at VI–134; E. Cleary, McCormick on Evidence § 43, p. 93 (3d ed. 1984) (hereinafter Cleary).

While a Court of Appeals Judge, William Howard Taft, having determined that both common law and an Ohio statute permitted prior felonies impeachment in criminal cases, stated: "It is difficult to see any reason why the legislature should permit the credibility of a witness in a criminal case to be attacked by proof of former conviction, but should withhold such permission in civil cases." *Baltimore & O. R. Co.* v. *Rambo*, 59 F. 75, 79 (CA6 1893). He concluded that evidence that a civil defendant's witness had been convicted of burglary could be admitted as impeachment, though not in the plaintiff's case in chief. See also *Wounick* v. *Hysmith*, 423 F. 2d 873 (CA3 1970) (Circuit precedent permitted admission of all *crimen falsi* convictions); *Oklahoma ex rel. Nesbitt* v. *Allied Materials Corp.*, 312 F. Supp. 130, 133 (WD Okla. 1968); *Taylor* v. *Atchison, T. & S. F. R. Co.*, 33 F. R. D. 283, 285 (WD Mo. 1962).

[11] In a seminal article, Dean Ladd questioned the traditional rule's "premise, that the doing of an act designated by organized society as a crime is itself an indication of testimonial unreliability," and advocated barring impeachment by evidence of convictions bearing no relation to a witness' truthfulness. Ladd, Credibility Tests—Current Trends, 89 U. Pa. L. Rev. 166, 176, 191 (1940). See also McGowan, Impeachment of Criminal Defendants by Prior Conviction, 1970 Law & Social Order 1 (hereafter McGowan); Comments following A. L. I., Model Code of Evidence, Rule 106, pp. 128–129 (1942).

Among those who seemed to strain against the conventional rule was Judge Learned Hand, who, in allowing impeachment of a civil antitrust defendant by evidence of a *nolo contendere* plea, wrote:

"[S]o far as we can see, the greater number of jurisdictions allow the conviction as evidence to impeach a witness. Where there is a doubt as to the competency of evidence, Federal Rules of Civil Procedure, rule 43(a) . . . admonishes us to admit it rather than to exclude it; and for that reason we think it should have been here admitted. In all such cases there is of course the danger that the jury will use the plea as an admission of the 'operative' facts; but that is equally true of a conviction on a plea of guilty or on a verdict. Whether the attempt is ever practicable to limit its use to the witness's credibility, and whether, if not, its use is an injustice, are not

In 1942, the American Law Institute proposed a rule that would have given the trial judge discretion in all cases[12] to exclude evidence of prior convictions of any witness if "its probative value is outweighed by the risk that its admission will . . . create substantial danger of undue prejudice . . . ."[13] Model Code of Evidence, Rule 303 (1942); see Rule 106. No such evidence could be admitted against a witness-accused unless he first introduced "evidence for the sole purpose of supporting his credibility." Rule 106(3).

A decade later the American Bar Association endorsed a rule that further limited impairment of any witness' credibility to convictions for crimes "involving dishonesty or false statement." National Conference of Commissioners, Uniform Rules of Evidence, Rule 21 (1953). As with Model Rule 106, this evidence would not be admitted against a witness-accused unless he adduced evidence supporting his credibility. *Ibid.* This code too afforded the judge discretion to exclude impeaching evidence in both criminal and civil trials if on balance he deemed it too prejudicial. See Rules 2, 45.

The only contemporaneous congressional enactment governing impeachment by prior convictions stated:

> "No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or evidence aliunde . . . ." D. C. Code Ann. § 14–305 (1961).

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open questions for us." *Pfotzer* v. *Aqua Systems, Inc.*, 162 F. 2d 779, 785 (CA2 1947).

See also *Pasternak* v. *Pan American Petroleum Corp.*, 417 F. 2d 1292 (CA10 1969) (exercising discretion despite contrary state rule); *Ruffalo's Trucking Service, Inc.* v. *National Ben-Franklin Insurance Co. of Pittsburgh*, 243 F. 2d 949 (CA2 1957) (holding state law permits discretion).

[12] Model Code of Evidence, Rule 2 (1942).

[13] This blending of Rules 106 and 303 is justified by the latter Rule's provision that "[a]ll Rules stating evidence to be admissible are subject to this Rule unless the contrary is expressly stated." See Rule 303(2).

This provision of the District of Columbia Code traditionally had been interpreted to require the admission of prior conviction evidence. McGowan, 1970 Law & Social Order 1. But in reviewing a defendant's challenge to admission of a grand larceny conviction to impeach his testimony at his trial on housebreaking and larceny charges, the Court of Appeals for the District of Columbia Circuit noted that the Rule said conviction evidence "may," not "shall," be admitted; therefore, a judge was not required to allow such impeachment. *Luck* v. *United States*, 121 U. S. App. D. C. 151, 156, 348 F. 2d 763, 768 (1965). In effect, the court conditioned admissibility on the kind of judicial balancing expressly provided in the Uniform Rules and Model Code.[14] *Id.*, at 156, n. 8, 348 F. 2d, at 768, n. 8. Far from welcoming this innovation, the Federal Department of Justice in 1969 proposed changing the code to overrule *Luck*, and in 1970 Congress amended the District of Columbia Code to provide that both prior felony and *crimen falsi* impeaching evidence "shall be admitted."[15]

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[14] Writing for the Court of Appeals' panel, Judge McGowan explained:

"The trial court is not *required* to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute, in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case. There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing *[sic]* that opportunity because of the fear of prejudice founded upon a prior conviction. There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. This last is, of course, a standard which trial judges apply every day in other contexts; and we think it has both utility and applicability in this field." *Luck* v. *United States*, 121 U. S. App. D. C. 151, 156, 348 F. 2d 763, 768 (1965) (emphasis in original) (footnote omitted).

[15] Section 133(b) of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91–358, 84 Stat. 551, D. C. Code Ann. § 14–305(b) (1967 ed., Supp. IV 1971), provided in part that

"for the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a criminal offense shall be admitted if

Amid controversy over *Luck*, a distinguished Advisory Committee appointed at the recommendation of the Judicial Conference of the United States submitted in March 1969 the first draft of evidence rules to be used in all federal civil and criminal proceedings.[16] Rule 6–09, forerunner of Federal Rule of Evidence 609, allowed all *crimen falsi* and felony convictions evidence without mention of judicial discretion.[17] The Committee reasoned that "[d]angers of unfair prejudice, confusion of issues, misleading the jury, waste of time, and surprise" inherent in the admission of evidence of witness misconduct "tend to disappear or diminish" when the evidence is based on a conviction. Preliminary Draft of Proposed Rules of Evidence, Advisory Committee's Note, 46 F. R. D. 161, 297 (1969). Having considered five options—including the *Luck* doctrine—for further reducing risks to a witness-accused, the Committee found none acceptable, and so proposed a rule that "adheres to the traditional practice of allowing the witness-accused to be impeached by evidence of conviction of crime, like other witnesses." *Id.*, at 299.

Nonetheless, the Advisory Committee embraced the *Luck* doctrine in its second draft. Issued in March 1971, this version of Rule 609(a) authorized the judge to exclude either felony or *crimen falsi* evidence upon determination that its probative value was "substantially outweighed by the danger

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offered, . . . but only if the criminal offense (A) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (B) involved dishonesty or false statement (regardless of punishment)."

[16] Preliminary Draft of Proposed Rules of Evidence, 46 F. R. D. 161 (1969); see Rule 11–01(b), *id.*, at 417.

[17] The first draft provided:

"(a) GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime, (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (2) involved dishonesty or false statement regardless of the punishment." *Id.*, at 295–296.

of unfair prejudice."[18] Revised Draft of Proposed Rules of Evidence, 51 F. R. D. 315, 391 (1971). The Committee specified that its primary concern was prejudice to the witness-accused; the "risk of unfair prejudice to a party in the use of [convictions] to impeach the ordinary witness is so minimal as scarcely to be a subject of comment." Advisory Committee's Note, *id.*, at 392. Yet the text of the proposal was broad enough to allow a judge to protect not only criminal defendants, but also civil litigants and nonparty witnesses, from unfair prejudice. Cf. *ibid.* (safeguards in Rule 609(b), (c), (d) apply to all witnesses).

As had *Luck*'s interpretation of the District of Columbia Code, the Advisory Committee's revision of Rule 609(a) met resistance. The Department of Justice urged that the Committee supplant its proposal with the strict, amended version of the District Code. Moore § 609.01[1.—7], p. VI–111. Senator McClellan objected to the adoption of the *Luck* doctrine and urged reinstatement of the earlier draft.[19]

The Advisory Committee backed off. As Senator McClellan had requested, it submitted as its third and final draft the same strict version it had proposed in March 1969. Rules of

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[18] The second draft of Rule 609(a) provided:

"General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime, except on a plea of *nolo contendere*, is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment, unless (3) *in either case, the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.*" Revised Draft of Proposed Rules of Evidence, 51 F. R. D. 315, 391 (1971) (emphasis supplied).

[19] "If the 1970 Crime Act is to be overturned," McClellan wrote in a letter to Judge Maris, the Advisory Committee's chairman, "I suggest that this is a question for the Congress to decide." Supplement to Hearings on the Proposed Rules of Evidence before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93d Cong., 1st Sess., p. 54 (1973).

Evidence, 56 F. R. D. 183, 269–270 (1973). The Committee's Note explained:

> "The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of *crimen falsi* without regard to the grade of the offense. This is the view accepted by Congress in the 1970 amendment of § 14–305 of the District of Columbia Code . . . . Whatever may be the merits of [other] views, this rule is drafted to accord with the Congressional policy manifested in the 1970 legislation." *Id.*, at 270.

This Court forwarded the Advisory Committee's final draft to Congress on November 20, 1972.

The House of Representatives did not accept the Advisory Committee's final proposal. A Subcommittee of the Judiciary Committee recommended an amended version similar to the text of the present Rule 609(a), except that it avoided the current Rule's ambiguous reference to prejudice to "the defendant." Rather, in prescribing weighing of admissibility of prior felony convictions, it used the same open-ended reference to "unfair prejudice" found in the Advisory Committee's second draft.[20]

The House Judiciary Committee departed even further from the Advisory Committee's final recommendation, preparing a draft that did not allow impeachment by evidence of prior conviction unless the crime involved dishonesty or false statement.[21] Motivating the change were concerns about the deterrent effect upon an accused who might wish to testify and the danger of unfair prejudice, "even upon a witness who was not the accused," from allowing impeachment by prior felony convictions regardless of their relation to the witness' veracity. H. R. Rep. No. 93–650, p. 11 (1973). Although the Committee Report focused on criminal defendants and did not mention civil litigants, its express concerns encompassed all nonaccused witnesses.

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[20] The formulation of the Special Subcommittee on Reform of Federal Criminal Laws of the House Judiciary Committee provided:

"For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime (1) was punishable by death or imprisonment in excess of one year, unless the Court determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction, or (2) involved dishonesty or false statement." H. R. Rep. No. 93–650, p. 11 (1973).

Compare *ibid.*, with Federal Rule of Evidence 609(a) and Proposed Rule of Evidence 609(a), 51 F. R. D., at 391.

Representatives who advocated the automatic admissibility approach of the Advisory Committee's draft and those who favored the intermediate approach proposed by the Subcommittee both opposed the Committee's bill on the House floor. Four Members pointed out that the Rule applied in civil, as well as criminal, cases.[22] The House voted to adopt the Rule as proposed by its Judiciary Committee.

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[21] The version sent to the full House by the Judiciary Committee simply provided:

"(a) General Rule.—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime involved dishonesty or false statement." 120 Cong. Rec. 2374 (1974).

[22] Seeking to substitute the Advisory Committee's final draft for the House Judiciary Committee version, Representative Hogan declared that his "amendment would benefit parties on all sides of litigation—the civil plaintiffs and civil defendants, the Government in prosecutions and the criminal defendant." 120 Cong. Rec. 2376 (1974).

Representative Dennis, defending the version that he had shepherded through the House Judiciary Committee and onto the House floor, maintained that it too

"does not apply only to a man who is a defendant in a criminal case, but it applies to any witness. Under the rule that the gentleman has in his amendment, if 20 years ago you were guilty of some misdemeanor and were called in as a witness in a civil case, then they could ask you about it, although that case had nothing to do with the case on trial before you." *Id.*, at 2377.

"The difficulty here," Representative Wiggins foresaw, "is we are dealing with a complex problem and are trying to fashion a single rule adequate to take care of the problem . . . . [F]urther draftsmanship is necessary to

The Senate Judiciary Committee proposed an intermediate path. For criminal defendants, it would have allowed impeachment only by *crimen falsi* evidence; for other witnesses, it also would have permitted prior felony evidence only if the trial judge found that probative value outweighed "prejudicial effect against the party offering that witness."[23] This language thus required the exercise of discretion before prior felony convictions could be admitted in civil litigation. But the full Senate, prodded by Senator McClellan, reverted to the version that the Advisory Committee had submitted. See 120 Cong. Rec. 37076, 37083 (1974).

Conflict between the House bill, allowing impeachment only by *crimen falsi* evidence, and the Senate bill, embodying the Advisory Committee's automatic admissibility approach, was resolved by a Conference Committee.[24] The

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spin off criminal cases from civil cases, to separate the nonparty witness problem from the party witness problem. As we deal with the total problem under a single rule, we create all this uncertainty and the possibility of inequity . . . ." *Id.*, at 2379.

Supporting Representative Hogan's rule of admissibility for all felonies, Representative Lott commented:

"[I]t is essential to recognize that this is a rule that would have application in both civil and criminal cases, and which would apply not only to witnesses for the defense, but witnesses for the plaintiff or the prosecution as well. . . . [A] jury is entitled to all the evidence bearing on the witness's tendency to tell the truth." *Id.*, at 2381.

[23] S. Rep. No. 93–1277, p. 14 (1974). The Senate Judiciary Committee's actual draft was even less specific on this point, stating:

"(a) General Rule.—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime may be elicited from him or established by public record during cross-examination but only if the crime (1) involved dishonesty or false statement or (2) in the case of witnesses other than the accused, was punishable by death or imprisonment in excess of one year under the law under which he was convicted, but only if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect." 120 Cong. Rec. 37076 (1974).

[24] Cf. 120 Cong. Rec. 40894 (1974) (remarks of Rep. Dennis) ("[I]n conference, we came up with a compromise which does not suit me 100 per-

conferees' compromise—enacted as Federal Rule of Evidence 609(a)(1)—authorizes impeachment by felony convictions, "but only if" the court determines that probative value outweighs "prejudicial effect to the defendant." The Conference Committee's Report makes it perfectly clear that the balance set forth in this draft, unlike the second Advisory Committee and the Senate Judiciary Committee versions, does not protect all nonparty witnesses:

> "The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible." H. R. Conf. Rep. No. 93–1597, pp. 9–10 (1974).

Accord, *Linskey* v. *Hecker*, 753 F. 2d 199, 201 (CA1 1985). Equally clear is the conferees' intention that the rule shield the accused, but not the prosecution,[25] in a criminal case. Impeachment by convictions, the Committee Report stated, "should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record." H. R. Conf. Rep. No. 93–1597, *supra*, at 10.

But this emphasis on the criminal context, in the Report's use of terms such as "defendant" and "to convict" and in in-

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cent, but which is a slight advance over the present law. It is the best we thought we could do . . .").

[25] As one Conference Committee Member explained:

"[N]ow a defendant can cross examine a government witness about any of his previous felony convictions; he can always do it, because that will not prejudice him in anyway. . . . Only the government is going to be limited . . . ." *Ibid.* (remarks of Rep. Dennis).

See also Cleary § 43, at 94; Louisell § 316, at 325.

dividual conferees' explanations of the compromise,[26] raises some doubt over the Rule's pertinence to civil litigants. The discussions suggest that only two kinds of witnesses risk prejudice—the defendant who elects to testify in a criminal case and witnesses other than the defendant in the same kind of case. Nowhere is it acknowledged that undue prejudice to a civil litigant also may improperly influence a trial's outcome. Although this omission lends support to Judge Gibbons' opinion that "legislative oversight" caused exclusion of civil parties from Rule 609(a)(1)'s balance, see *Diggs*, 741 F. 2d, at 583, a number of considerations persuade us that the Rule was meant to authorize a judge to weigh prejudice against no one other than a criminal defendant.

A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change. Cf. *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U. S. 494, 502 (1986). The weight of authority before Rule 609's adoption accorded with the Advisory Committee's final draft, admitting all felonies without exercise of judicial discretion in either civil or criminal cases. Departures from this general rule had occurred overtly by judicial interpretation, as in *Luck* v. *United States*, 121 U. S. App. D. C. 151, 348 F. 2d 763 (1965), or in evidence codes, such as the Model Code and the Uniform Rules. Rule 609 itself explicitly adds safeguards circumscribing the common-law rule. See Advisory Committee's Note, 56 F. R. D., at 270–271. The unsubstantiated assumption that legislative oversight produced Rule 609(a)(1)'s ambiguity respecting civil trials hardly demonstrates that Congress intended silently to overhaul the law of impeachment in the civil context. Cf. *NLRB* v. *Plasterers*, 404 U. S. 116, 129–130 (1971).

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[26] Representative Dennis, who had stressed in earlier debates that the Rule would apply to both civil and criminal cases, see 120 Cong. Rec. 2377 (1974), explained the benefits of the Rule for criminal defendants and made no reference to benefits for civil litigants when he said:

> "[Y]ou can ask about all . . . felonies on cross examination, only if you can convince the court, and the burden is on the *government*, which is an important change in the law, that the probative value of the question is greater than the damage to the *defendant;* and that is damage or prejudice *to the defendant alone.*" *Id.*, at 40894 (emphases supplied).

In the same debate Representative Hogan manifested awareness of the Rule's broad application. While supporting the compromise, he reiterated his preference for a rule

> "that, for the purpose of attacking the credibility of a witness, *even if the witness happens to be the defendant in a criminal case*, evidence that he has been convicted of a crime is admissible and may be used to challenge that witness' credibility if the crime is a felony or is a misdemeanor involving dishonesty of *[sic]* false statement." *Id.*, at 40895 (emphasis added).

To the extent various drafts of Rule 609 distinguished civil and criminal cases, moreover, they did so only to mitigate prejudice to criminal defendants. Any prejudice that convictions impeachment might cause witnesses other than the accused was deemed "so minimal as scarcely to be a subject of comment." Advisory Committee's Note, 51 F. R. D., at 392. Far from voicing concern lest such impeachment unjustly diminish a civil witness in the eyes of the jury, Representative Hogan declared that this evidence ought to be used to measure a witness' moral value.[27] Furthermore, Representative Dennis—who in advocating a Rule limiting impeachment to *crimen falsi* convictions had recognized the impeachment Rule's applicability to civil trials—not only debated the issue on the House floor, but also took part in the conference out of which Rule 609 emerged. See 120 Cong. Rec. 2377–2380, 39942, 40894–40895 (1974). These factors indicate that Rule 609(a)(1)'s textual limitation of the prejudice balance to criminal defendants resulted from deliberation, not oversight.[28]

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[27] "Suppose some governmental body instituted a civil action for damages, and the defendant called a witness who had been previously convicted of malicious destruction of public property. Under the committee's formulation, the convictions could not be used to impeach the witness' credibility since the crimes did not involve dishonesty or false statement. Yet, in the hypothetical case, as in any case in which the government was a party, justice would seem to me to require that the jury know that the witness had been carrying on some private war against society. Should a witness with an antisocial background be allowed to stand on the same basis of believability before juries as law-abiding citizens with unblemished records? I think not.

. . . . .

"Personally I am more concerned about the moral worth of individuals capable of engaging in such outrageous acts as adversely reflecting on a witness' character than I am of thieves . . . ." *Id.*, at 2376.

Had the conferees desired to protect other parties or witnesses, they could have done so easily. Presumably they had access to all of Rule 609's precursors, particularly the drafts prepared by the House Subcommittee and the Senate Judiciary Committee, both of which protected the civil litigant as well as the criminal defendant. Alternatively, the conferees could have amended their own draft to include other parties.[29] They did not for the simple reason that they intended that only the accused in a criminal case should be protected from unfair prejudice by the balance set out in Rule 609(a)(1).

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[28] Cf. Foster, 57 Ford. L. Rev., at 8 ("[T]his rule emerged in its present form as a deliberate, yet uneasy compromise between opposing positions in a sharply-divided Congress").

[29] For example, the current Uniform Rule of Evidence 609(a)(1), promulgated in 1974, simply inserted "to a party or the witness" in place of "to the defendant" in Federal Rule of Evidence 609(a)(1). See also Louisell § 314, at 310–315; *id.*, at 147–156 (Supp. 1988) (detailing States' revisions of Federal Rule of Evidence 609).

Recently, two Advisory Committees proposed versions of Rule 609(a)(1) that expressly protect all witnesses. The preliminary draft of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States provides that a witness other than a criminal defendant may be impeached by a conviction for a felony unrelated to truthfulness only after balancing according to Federal Rule of Evidence 403. Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Federal Rules of Bankruptcy Procedure, and the Federal Rules of Evidence. Meanwhile, the Committee on Rules of Criminal Procedure and Evidence of the American Bar Association's Criminal Justice Section recommends deleting "to the defendant" from Rule 609(a)(1), thus requiring courts simply to "determin[e] that the probative value of admitting this evidence outweighs its prejudicial effect." Federal Rules of Evidence: A Fresh Review and Evaluation 56 (1987).

III

That conclusion does not end our inquiry. We next must decide whether Rule 609(a)(1) governs all prior felonies impeachment, so that no discretion may be exercised to benefit civil parties, or whether Rule 609(a)(1)'s specific reference to the criminal defendant leaves Rule 403 balancing available in the civil context.

Several courts, often with scant analysis of the interrelation between Rule 403 and Rule 609(a)(1), have turned to Rule 403 to weigh prejudice and probativeness of impeaching testimony in civil cases.[30] Judge Gibbons, dissenting in *Diggs*, 741 F. 2d, at 583, labeled this a "sensible approach." Indeed it may be. Prodigious scholarship highlighting the irrationality and unfairness of impeaching credibility with evidence of felonies unrelated to veracity indicates that judicial exercise of discretion is in order. If Congress intended otherwise, however, judges must adhere to its decision.

A general statutory rule usually does not govern unless there is no more specific rule. See *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U. S. 204, 208 (1932). Rule 403, the more general provision, thus comes into play only if Rule 609, though specific regarding criminal defendants, does not pertain to civil witnesses. See Advisory Committee's Note to Proposed Rule 403, 56 F. R. D., at 218. The legislative history evinces some confusion about Rule 403's applicability to a version of Rule 609 that included no balancing language.[31] That confusion is not an obstacle because the structure of the Rules as enacted resolves the question.

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[30] The most extensive discussion reaching this result occurs in *Donald* v. *Wilson*, 847 F. 2d 1191 (CA6 1988). More frequently, courts employ Rule 403 without resolving the applicability of Rule 609(a)(1), as in *Jones* v. *Board of Police Comm'rs*, 844 F. 2d 500 (CA8 1988), cert. pending, No. 88-5468; *Abshire* v. *Walls*, 830 F. 2d 1277 (CA4 1987); *Radtke* v. *Cessna Aircraft Co.*, 707 F. 2d 999 (CA8 1983); *Czajka* v. *Hickman*, 703 F. 2d 317 (CA8 1983); and *Shows* v. *M/V Red Eagle*, 695 F. 2d 114 (CA5 1983). Accord, *Hannah* v. *Overland*, 795 F. 2d 1385 (CA8 1986) (applying Rule 403 without mentioning Rule 609(a)(1)); *Wierstak* v. *Heffernan*, 789 F. 2d 968 (CA1 1986) (same).

Rule 609(a) states that impeaching convictions evidence "shall be admitted."[32] With regard to subpart (2), which governs impeachment by *crimen falsi* convictions, it is widely agreed that this imperative, coupled with the absence of any balancing language, bars exercise of judicial discretion pursuant to Rule 403.[33] Subpart (1), concerning felonies, is subject to the same mandatory language; accordingly, Rule 403 balancing should not pertain to this subsection either.[34]

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[31] Illustrative is this colloquy during the testimony before the House Subcommittee of Henry J. Friendly, then Chief Judge of the Second Circuit:

"Judge FRIENDLY. . . . [O]f course, there is the overriding rule that the judge can always exclude testimony where probative value he thinks is outweighed by its prejudicial effect and perhaps in the case we are discussing he should do that.

"Mr. HUNGATE. Would that be true with or without the rules?

"Judge FRIENDLY. That is true today.

"Mr. HUNGATE. Would it remain true if these rules became effective?

"Judge FRIENDLY. I assume they have such a rule in here. I could easily check.

"Mr. DENNIS. It seems to me if he has to follow this rule he does not have much discretion. Maybe he still could rule something out. I am not sure.

. . . . .

"Mr. HUNGATE. I believe section 403 is the rule to which you are referring. . . .

"Judge FRIENDLY. I think . . . Congressman [Dennis'] point is a good one. You have the problem: Does that apply when there is a specific rule on the subject? This just says relevant evidence may be excluded if it has this effect. But then somebody is going to argue, this other rule dealt very specifically with the question and rule 403 is out. I don't know what the answer would be." Hearings on Proposed Rules of Evidence before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary, 93d Cong., 1st Sess., pp. 251–252 (1973).

See also 120 Cong. Rec. 2381 (1974) (remarks of Rep. Lott) (suggesting that if automatic admissibility rule were adopted, Rule 403 balancing would be available). Cf. *Campbell*, 831 F. 2d, at 705.

[32] The process by which Congress changed the District of Columbia Code to provide that impeaching evidence "shall," not "may," be admitted, see *supra*, at 514, makes it evident that this mandatory language was intended. Contra, Saltzburg 366.

Any argument that Rule 403 overrides Rule 609 loses force when one considers that the Rule contains its own weighing language, not only in subsection (a)(1), but also in sections (b), pertaining to older convictions, and (d), to juvenile adjudications. These latter balances, like Rule 609 in general, apply to both civil and criminal witnesses. See Fed. Rule Evid. 1101(b). Earlier drafts of subsection (a)(1) also contained balancing provisions that comprehended both types of witnesses; these, as we have shown, deliberately were eliminated by advocates of an automatic admissibility rule. The absence of balances within only two aspects of the Rule—*crimen falsi* convictions and felony convictions of witnesses other than those whose impeachment would prejudice a criminal defendant—must be given its proper effect. Thus Rule 609(a)(1)'s exclusion of civil witnesses from its weighing language is a specific command that impeachment of such witnesses be admitted, which overrides a judge's general discretionary authority under Rule 403. Courts relying on Rule 403 to balance probative value against prejudice to civil witnesses depart from the mandatory language of Rule 609.[35]

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[33] *E. g., United States* v. *Kuecker*, 740 F. 2d 496 (CA7 1984); *United States* v. *Wong*, 703 F. 2d 65 (CA3) *(per curiam)*, cert. denied, 464 U. S. 842 (1983); Cleary § 43, at 95; 2 C. Wright, Federal Practice and Procedure § 416, p. 554 (1982); Saltzburg 366.

[34] See Foster, 57 Ford. L. Rev., at 15 ("It strains logic to view Rule 403 as modifying one subsection of a specific rule containing its own balancing proviso, but not as modifying the other subsection, where neither the rule nor its legislative history reveals any intent to invoke Rule 403's residual discretion"); see also *Campbell*, 831 F. 2d, at 705.

[35] Accord, *id.*, at 706 ("[W]here, as in Rule 609(a), Congress has taken pains to specify the conditions for both the admission and the exclusion of a

In summary, we hold that Federal Rule of Evidence 609(a)(1) requires a judge to permit impeachment of a civil witness with evidence of prior felony convictions regardless of ensuant unfair prejudice to the witness or the party offering the testimony. Thus no error occurred when the jury in this product liability suit learned through impeaching cross-examination that plaintiff Green was a convicted felon. The judgment of the Court of Appeals is

Affirmed.

JUSTICE SCALIA, concurring in the judgment.

We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. Our task is to give some alternative meaning to the word "defendant" in Federal Rule of Evidence 609(a)(1) that avoids this consequence; and then to determine whether Rule 609(a)(1) excludes the operation of Federal Rule of Evidence 403.

I think it entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition (civil defendants but not civil plaintiffs receive the benefit of weighing prejudice) was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word "defendant" in the Rule. For that purpose, however, it would suffice to observe that counsel have not provided, nor have we discovered, a shred of evidence that anyone has ever proposed or assumed such a bizarre disposition. The Court's opinion, however, goes well beyond this. Approximately four-fifths of its substantive analysis is devoted to examining the evolution of Federal Rule of Evidence 609, from the 1942 Model Code of Evidence, to the 1953 Uniform Rules of Evidence, to the 1965 *Luck* case and the 1970 statute overruling it, to the Subcommittee,

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specific class of evidence (convictions), district courts may not use Rule 403 to set that specification at naught").

Committee, and Conference Committee Reports, and to the so-called floor debates on Rule 609—all with the evident purpose, not merely of confirming that the word "defendant" cannot have been meant literally, but of determining what, precisely, the Rule does mean.

I find no reason to believe that any more than a handful of the Members of Congress who enacted Rule 609 were aware of its interesting evolution from the 1942 Model Code; or that any more than a handful of them (if any) voted, with respect to their understanding of the word "defendant" and the relationship between Rule 609 and Rule 403, on the basis of the referenced statements in the Subcommittee, Committee, or Conference Committee Reports, or floor debates—statements so marginally relevant, to such minute details, in such relatively inconsequential legislation. The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind. I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a result different from the one that these factors suggest.

I would analyze this case, in brief, as follows:

(1) The word "defendant" in Rule 609(a)(1) cannot rationally (or perhaps even constitutionally) mean to provide the benefit of prejudice-weighing to civil defendants and not civil plaintiffs. Since petitioner has not produced, and we have not ourselves discovered, even a snippet of support for this absurd result, we may confidently assume that the word was

not used (as it normally would be) to refer to all defendants and only all defendants.

(2) The available alternatives are to interpret "defendant" to mean (a) "civil plaintiff, civil defendant, prosecutor, and criminal defendant," (b) "civil plaintiff and defendant and criminal defendant," or (c) "criminal defendant." Quite obviously, the last does least violence to the text. It adds a qualification that the word "defendant" does not contain but, unlike the others, does not give the word a meaning ("plaintiff" or "prosecutor") it simply will not bear. The qualification it adds, moreover, is one that could understandably have been omitted by inadvertence—and sometimes is omitted in normal conversation ("I believe strongly in defendants' rights"). Finally, this last interpretation is consistent with the policy of the law in general and the Rules of Evidence in particular of providing special protection to defendants in criminal cases.*

(3) As well described by the Court, the "structure of the Rules," *ante*, at 525, makes it clear that Rule 403 is not to be applied in addition to Rule 609(a)(1).

I am frankly not sure that, despite its lengthy discussion of ideological evolution and legislative history, the Court's reasons for both aspects of its decision are much different from mine. I respectfully decline to join that discussion, however, because it is natural for the bar to believe that the ju-

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*Acknowledging the statutory ambiguity, the dissent would read "defendant" to mean "any party" because, it says, this interpretation "extend[s] the protection of judicial supervision to a larger class of litigants" than the interpretation the majority and I favor, which "takes protection *away* from litigants." *Post*, at 534–535. But neither side in this dispute can lay claim to generosity without begging the policy question whether judicial supervision is better than the automatic power to impeach. We could as well say—and with much more support in both prior law, see *ante*, at 511–512, and this Court's own recommendation, see *ante*, at 517—that our reading "extend[s] the protection of [the right to impeach with prior felony convictions] to a larger class of litigants" than the dissent's interpretation, which "takes protection *away* from litigants."

ridical importance of such material matches its prominence in our opinions—thus producing a legal culture in which, when counsel arguing before us assert that "Congress has said" something, they now frequently mean, by "Congress," a committee report; and in which it was not beyond the pale for a recent brief to say the following: "Unfortunately, the legislative debates are not helpful. Thus, we turn to the other guidepost in this difficult area, statutory language." Brief for Petitioner in *Jett* v. *Dallas Independent School District*, O. T. 1988, No. 87–2084, p. 21.

For the reasons stated, I concur in the judgment of the Court.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Federal Rule of Evidence 609(a) has attracted much attention during its relatively short life. This is due in no small part to its poor and inartful drafting. See, *e. g.*, 10 J. Moore & H. Bendix, Moore's Federal Practice § 609.14[4], p. V–148 (2d ed. 1988); Foster, Rule 609(a) in the Civil Context: A Recommendation for Reform, 57 Ford. L. Rev. 1, 4 (1988); Younger, Three Essays on Character and Credibility under the Federal Rules of Evidence, 5 Hofstra L. Rev. 7, 11–12 (1976); Savikas, New Concepts in Impeachment: Rule 609(a), Federal Rules of Evidence, 57 Chicago Bar Rec. 76 (1975). As noted by the majority, *ante*, at 510–511, the Rule's use of the word "defendant" creates inescapable ambiguity. The majority concludes that Rule 609(a)(1) cannot mean what it says on its face. *Ante*, at 511. I fully agree.

I fail to see, however, why we are required to solve this riddle of statutory interpretation by reading the inadvertent word "defendant" to mean "criminal defendant." I am persuaded that a better interpretation of the Rule would allow the trial court to consider the risk of prejudice faced by any party, not just a criminal defendant. Applying the balancing provisions of Rule 609(a)(1) to all parties would have prevented the admission of unnecessary and inflammatory evidence in this case and would prevent other similar unjust results until Rule 609(a) is repaired, as it must be. The result the Court reaches today, in contrast, endorses "the irrationality and unfairness," *ante*, at 524, of denying the trial court the ability to weigh the risk of prejudice to any party before admitting evidence of a prior felony for purposes of impeachment.

A

The majority's lengthy recounting of the legislative history of Rule 609, *ante*, at 513–514, demonstrates why almost all that history is entitled to very little weight. Because the proposed rule changed so often—and finally was enacted as a compromise between the House and the Senate—much of the commentary cited by the majority concerns versions different from the Rule Congress finally enacted.

The only item of legislative history that focuses on the Rule as enacted is the Report of the Conference Committee, H. R. Conf. Rep. No. 93–1597 (1974). Admittedly, language in the Report supports the majority's position: the Report mirrors the Rule in emphasizing the prejudicial effect on the defendant, and also uses the word "convict" to describe the potential outcome. *Id.*, at 9–10. But the Report's draftsmanship is no better than the Rule's, and the Report's plain language is no more reliable an indicator of Congress' intent than is the plain language of the Rule itself.

Because the slipshod drafting of Rule 609(a)(1) demonstrates that clarity of language was not the Conference's forte, I prefer to rely on the underlying reasoning of the Report, rather than on its unfortunate choice of words, in ascertaining the Rule's proper scope. The Report's treatment of the Rule's discretionary standard consists of a single paragraph. After noting that the Conference was concerned with prejudice to a defendant, the Report, at 9–10, states:

> "The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Confer-

> ence as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record."

The Report indicates that the Conference determined that any felony conviction has sufficient relevance to a witness' credibility to be admitted, even if the felony had nothing directly to do with truthfulness or honesty. In dealing with the question of undue prejudice, however, the Conference drew a line: it distinguished between two types of prejudice, only one of which it permitted the trial court to consider.

As the Conference observed, admitting a prior conviction will always "prejudice" a witness, who, of course, would prefer that the conviction not be revealed to the public. The Report makes clear, however, that this kind of prejudice to the witness' life outside the courtroom is not to be considered in the judicial balancing required by Rule 609(a)(1). Rather, the kind of prejudice the court is instructed to be concerned with is prejudice which "presents a danger of improperly influencing the outcome of the trial." Congress' solution to that kind of prejudice was to require judicial supervision: the conviction may be admitted only if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." Rule 609(a)(1).

Although the Conference expressed its concern in terms of the effect on a criminal defendant, the potential for prejudice to the outcome at trial exists in any type of litigation, whether criminal or civil, and threatens all parties to the litigation. The Report and the Rule are best read as expressing Congress' preference for judicial balancing whenever there is a chance that justice shall be denied a party because of the unduly prejudicial nature of a witness' past conviction for a crime that has no direct bearing on the witness' truthfulness. In short, the reasoning of the Report suggests that by "prejudice to the defendant," Congress meant "prejudice to a party," as opposed to the prejudicial effect of the revelation of a prior conviction to the witness' own reputation.

B

It may be correct, as JUSTICE SCALIA notes in his opinion concurring in the judgment, that interpreting "prejudicial effect to the defendant" to include only "prejudicial effect to [a] *criminal* defendant," and not prejudicial effect to other categories of litigants as well, does the "least violence to the text," *ante*, at 529, if what we mean by "violence" is the interpolation of excess words or the deletion of existing words. But the reading endorsed by JUSTICE SCALIA and the majority does violence to the logic of the only rationale Members of Congress offered for the Rule they adopted.

Certainly the possibility that admission of a witness' past conviction will improperly determine the outcome at trial is troubling when the witness' testimony is in support of a criminal defendant. The potential, however, is no less real for other litigants. Unlike JUSTICE SCALIA, I do not approach the Rules of Evidence, which by their terms govern both civil and criminal proceedings, with the presumption that their general provisions should be read to "provid[e] special protection to defendants in criminal cases." *Ibid.* Rather, the Rules themselves specify that they "shall be construed to secure fairness in administration . . . to the end that the truth may be ascertained and proceedings justly determined" in *all* cases. Rule 102. The majority's result does not achieve that end.

C

The interpretation the majority adopts today, which limits the word "defendant" to mean *less* than it appears to mean on its face, creates an additional danger: the Rule as so interpreted is a trap for the unwary. As noted by the majority, the "Rule's plain language commands weighing of prejudice to a defendant in a civil trial as well as in a criminal trial." *Ante*, at 509. One of the primary purposes for enacting a set of evidentiary rules is to present precise answers to frequently posed questions. "A codification should be so wrought that it supplies answers to a lawyer's questions simpler, more comprehensible, and more easily found than those the lawyer could discover without the codification." Younger, Introduction, Symposium: The Federal Rules of Evidence, 12 Hofstra L. Rev. 251, 252 (1984). Relying on the plain language of Rule 609(a)(1), an attorney representing a civil defendant might well instruct his client's witness to take the stand, believing that a judge would pass upon the question whether "the probative value of admitting" the evidence of his prior conviction "outweighs its prejudicial effect." Yet under the majority's view, reliance on the plain language of the Rule would have been error on counsel's part. Now every lawyer who takes Rule 609(a) at face value will commit the same error, until the language of the Rule is changed. While in theory it is easy to presume that every busy practicing attorney keeps abreast of every single one of this Court's decisions, in the "real world" this obviously is not the case. The implications of the majority's opinion today require every lawyer who relies upon a Federal Rule of Evidence, or a Federal Rule of Criminal, Civil, or Appellate Procedure, to look *beyond* the plain language of the Rule in order to determine whether this Court, or some court controlling within the jurisdiction, has adopted an interpretation that takes away the protection the plain language of the Rule provides.

D

As I see it, therefore, our choice is between two interpretations of Rule 609(a)(1), neither of which is completely consistent with the Rule's plain language. The majority's interpretation takes protection *away* from litigants—*i. e.*, civil defendants—who would have every reason to believe themselves entitled to the judicial balancing offered by the Rule. The alternative interpretation—which I favor—also departs somewhat from the plain language, but does so by *extending* the protection of judicial supervision to a larger class of litigants—*i. e.*, to all parties. Neither result is compelled by the statutory language or the legislative history, but for me the choice between them is an easy one. I find it proper, as a general matter and under the dictates of Rule 102, to construe the Rule so as to avoid "unnecessary hardship," see *Burnet* v. *Guggenheim*, 288 U. S. 280, 285 (1933), and to produce a sensible result. See, *e. g.*, sources listed by the Court, *ante*, at 512–513, n. 11.

This case should have been decided on the basis of whether the Bock Laundry Machine Company designed and sold a dangerously defective machine without providing adequate warnings. The fact that Paul Green was a convicted felon, in a work-release program at a county prison, has little, if anything, to do with these issues. We cannot know precisely why the jury refused to compensate him for the sad and excruciating loss of his arm, but there is a very real possibility that it was influenced improperly by his criminal record. I believe that this is not a result Congress conceivably could have intended, and it is not a result this Court should endorse.

As the majority concludes otherwise, my hope is that Rule 609(a)(1) will be corrected without delay, preferably into a form that allows judicial oversight over, at the least, the use of any felony conviction that does not bear directly on a witness' honesty. It is encouraging that some efforts in this direction appear to be underway, see *ante*, at 523, n. 29, and that the damage Congress caused by its poor draftmanship soon may be undone.

I respectfully dissent.

HARDIN *v.* STRAUB

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87-7023. Argued March 22, 1989—Decided May 22, 1989

In 1986, petitioner, who is incarcerated in a Michigan state prison, filed a *pro se* complaint under 42 U. S. C. § 1983 alleging that prison authorities had deprived him of his federal constitutional rights during 1980 and 1981. The Federal District Court *sua sponte* dismissed the complaint because it had been filed after the expiration of Michigan's 3-year statutory limitations period for personal injury actions, which is applicable in federal civil rights actions under 42 U. S. C. § 1988 and this Court's decisions. The Court of Appeals affirmed, refusing to apply a Michigan statute that suspends limitations periods for persons under a legal disability, including prisoners, until one year after the disability has been removed.

Held: A federal court applying a state statute of limitations to an inmate's federal civil rights action should give effect to the State's provision tolling the limitations period for prisoners. The Court of Appeals' ruling to the contrary conflicts with *Board of Regents, University of New York* v. *Tomanio*, 446 U. S. 478, which held that limitations periods in § 1983 suits are to be determined by reference to the appropriate state statute of limitations and the coordinate tolling rules, as long as the state law would not defeat the goals of the federal law at issue. The Michigan tolling statute is consistent with § 1983's remedial purpose, since some inmates may be loathe to sue adversaries to whose daily supervision and control they remain subject, and even those who do file suit may not have a fair opportunity to establish the validity of their allegations while they are confined. Pp. 538–544.

836 F. 2d 549, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

Douglas R. Mullkoff, by appointment of the Court, 488 U. S. 953, argued the cause for petitioner. With him on the briefs were *Paul D. Reingold* and *Robert F. Gillett.*

Louis J. Caruso, Solicitor General of Michigan, argued the cause for respondent. With him on the brief were *Frank J. Kelley,* Attorney General, and *James L. Stropkai,* Assistant Attorney General.

JUSTICE STEVENS delivered the opinion of the Court.

This case presents the question whether a federal court applying a state statute of limitations to an inmate's federal civil rights action should give effect to the State's provision tolling the limitations period for prisoners.

Petitioner is incarcerated in a Michigan state prison. In 1986 he filed a *pro se* complaint pursuant to 42 U. S. C. § 1983, alleging that for approximately 180 days in 1980 and 1981 he had been held in solitary confinement in violation of his federal constitutional rights.[1] The District Court *sua sponte* dismissed the complaint because it had been filed after the expiration of Michigan's 3-year statutory limitations period for personal injury actions. The Court of Appeals affirmed. 836 F. 2d 549 (CA6 1987). Following its 3-day-old decision in *Higley* v. *Michigan Department of Corrections*, 835 F. 2d 623 (CA6 1987), the court refused to apply a Michigan statute that suspends limitations periods for persons under a legal disability until one year after the disability has been removed. Because that holding appeared to conflict with our decision in *Board of Regents, University of New York* v. *Tomanio*, 446 U. S. 478 (1980), we granted certiorari.[2] 488 U. S. 887 (1988). We now reverse.

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[1] The complaint alleged that petitioner had never received a hearing on his detention, even though an administrative regulation provided:

"'A resident shall be afforded an opportunity for a hearing . . . before being classified to administrative segergation (sic); however, a resident may be temporarily held in segregation status pending a hearing upon order of the institution head, or at the residents' *[sic]* request. This period may not exceed four (4) weekdays.'" Michigan Department of Corrections Administrative Rule 791.4405, as quoted in App. 7.

Petitioner contends that the detention without a hearing violated the Eighth and Fourteenth Amendments to the Federal Constitution. *Id.*, at 8.

[2] Since *Tomanio* was decided, other Courts of Appeals considering the timeliness of inmates' § 1983 actions regularly have applied States' tolling provisions to statutory limitations periods. See, *e. g.*, *Hughes* v. *Sheriff of Fall River County Jail*, 814 F. 2d 532 (CA8) (despite South Dakota statute's express exclusion of federal civil rights suits, holds plaintiff en-

In enacting 42 U. S. C. § 1988 Congress determined that gaps in federal civil rights acts should be filled by state law, as long as that law is not inconsistent with federal law.[3] See *Burnett* v. *Grattan*, 468 U. S. 42, 47–48 (1984). Because no federal statute of limitations governs, federal courts routinely measure the timeliness of federal civil rights suits by state law. *Id.*, at 49; *Chardon* v. *Fumero Soto*, 462 U. S. 650, 655–656 (1983); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 464 (1975). This tradition of borrowing analogous limitations statutes, cf. *O'Sullivan* v. *Felix*, 233 U. S. 318 (1914), is based on a congressional decision to defer to "the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Wilson* v. *Garcia*,

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titled to benefit of State's tolling provision), appeal dism'd, 484 U. S. 802 (1987); *Bailey* v. *Faulkner*, 765 F. 2d 102 (CA7 1985) (applying *Tomanio*, holds Indiana tolling statute not inconsistent with § 1983's policies, though "hopelessly archaic" given inmates' access to federal courts); *Whitson* v. *Baker*, 755 F. 2d 1406 (CA11 1985) *(per curiam)* (affirms State Supreme Court opinion interpreting Alabama statute to toll limitations period for convicted prisoners, despite state court's doubt that provision necessary); *Stephan* v. *Dowdle*, 733 F. 2d 642 (CA9 1984) (mentioning *Tomanio* and state-court interpretation of state law, overrules Circuit precedent and holds Arizona's tolling provision applies to inmates' actions pursuant to § 1983); *Turner* v. *Evans*, 721 F. 2d 341 (CA11 1983) *(per curiam)* (without discussing *Tomanio*, applies Georgia tolling provision); *May* v. *Enomoto*, 633 F. 2d 164 (CA9 1980) (citing pre-*Tomanio* Circuit precedent, gives effect to California's tolling statute); *Miller* v. *Smith*, 625 F. 2d 43 (CA5 1980) *(per curiam)* (in light of *Tomanio*, reverses earlier ruling in same case and holds Texas' tolling statute applies to prisoner's civil rights suit); *Brown* v. *Bigger*, 622 F. 2d 1025 (CA10 1980) *(per curiam)* (without mentioning *Tomanio* applies Kansas tolling provision to inmate's § 1983 suit).

[3] Section 1988 provides that in the event a federal civil rights statute is "deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ."

471 U. S. 261, 271 (1985).[4] "In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application." *Johnson, supra,* at 464. Courts thus should not unravel state limitations rules unless their full application would defeat the goals of the federal statute at issue. See, *e. g., Wilson, supra,* at 269; *Chardon, supra,* at 657.

These principles were invoked in *Board of Regents, University of New York* v. *Tomanio, supra,* to review a contention that a § 1983 action was barred by New York's 3-year limitations statute. The District Court and the Court of Appeals had rejected the defense by relying on a "federal tolling rule" not contained among the tolling provisions the state legislature had codified with its limitations periods. *Id.,* at 482, 486. This Court reversed. Limitations periods in § 1983 suits are to be determined by reference to the appropriate "state statute of limitations and the coordinate tolling rules"; New York's legislative choices in this regard were therefore "binding rules of law." *Id.,* at 484. Since the State's rules did not defeat either § 1983's chief goals of compensation and deterrence[5] or its subsidiary goals of uniformity and federalism, the Court held that Tomanio's suit was time barred. *Id.*, at 488–492.

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[4] Cf. *Chardon* v. *Fumero Soto,* 462 U. S. 650, 662 (1983) ("Until Congress enacts a federal statute of limitations to govern § 1983 litigation, comparable to the statute it ultimately enacted to solve the analogous problems presented by borrowing state law in federal antitrust litigation, federal courts must continue the practice of 'limitations borrowing' outlined in *Tomanio*") (footnote omitted).

[5] We reiterated just last Term that

"'the central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief.' *Burnett* v. *Grattan,* 468 U. S. 42, 55 (1984). Thus, § 1983 provides 'a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation,' *Mitchum* v. *Foster,* 407 U. S. 225, 239 (1972), and is to be accorded 'a sweep as broad as its language.' *United States* v. *Price,* 383 U. S. 787, 801 (1966)." *Felder* v. *Casey,* 487 U. S. 131, 139 (1988).

It is undisputed that the limitations period applicable to this case is three years, as established in Michigan's statute governing personal injury actions.[6] See *Owens* v. *Okure*, 488 U. S. 235 (1989); *Wilson* v. *Garcia*, *supra*. Since 1846, however, the Michigan Legislature has enacted provisions tolling the onset of limitations periods for prisoners and others suffering from legal disabilities.[7] The contemporary counterpart provides:

> "[I]f the person first entitled to make an entry or bring an action is under 18 years of age, insane, or imprisoned at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run." Mich. Comp. Laws Ann. § 600.5851(1) (1987).[8]

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[6] The pertinent Michigan limitations provision states:

"The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." Mich. Comp. Laws Ann. § 600.5805(8) (1987).

[7] Limitations periods applicable to various "personal actions" did not begin accruing for "any person . . . within the age of twenty-one years, or a married woman, insane, imprisoned in the state prison, or absent from the United States" until "after the disability shall be removed." Mich. Rev. Stat., Tit. 26, ch. 140, § 6 (1846). Similar tolling provisions protected "disabled" defendants in ejectment suits and plaintiffs in all real property actions. *Id.*, Tit. 23, ch. 108, § 39; *id.*, Tit. 26, ch. 139, § 5.

[8] Other States currently allowing some tolling of the limitations period for prisoners' lawsuits include: Ala. Code § 6–2–8 (1975); Ark. Code Ann. § 16–56–116 (1987) (if "imprisoned beyond the limits of the state"); Cal. Civ. Proc. Code Ann. § 352 (West Supp. 1989); Haw. Rev. Stat. § 657–13 (1985) (does not apply to "actions against the sheriff, chief of police, or other officers"); Idaho Code § 5–230 (Supp. 1988); Ill. Rev. Stat., ch. 110, ¶ 13–211 (1987) (excludes claims "against the Illinois Department of Corrections or any past or present employee or official of the Department of Corrections"); Kan. Stat. Ann. § 60–515 (1983) (inapplicable to prisoner who "has

Having passed this statute in 1961,[9] the Michigan Legislature revised it in 1972 without altering its effect on prisoners' lawsuits. A legislative committee recognized:

> "'[E]ven prisoners can bring civil actions, though they may not be allowed to be personally present, so it is not as necessary to provide long periods after the removal of the disability in which to sue as it was in the past when these disabilities were considerably more real. Nevertheless, it was considered better to allow a short period after the termination of the disability in which the person under the disability could bring an action.'" *Hawkins* v. *Justin*, 109 Mich. App. 743, 748, 311 N. W. 2d 465, 467 (1981) *(per curiam)*, quoting committee comment following Mich. Comp. Laws Ann. § 600.5851, p. 914 (1968).

Likewise, 1986 amendments to the provision did not affect its applicability to prison inmates. See historical note following Mich. Comp. Laws Ann. § 600.5851, p. 540 (1987).

In *Hawkins* v. *Justin*, *supra*, the Michigan Court of Appeals employed § 600.5851 to toll a state-law libel action by a plaintiff who was incarcerated in a state correctional institution. "[T]he purpose of the statute is to provide prisoners with additional time to assert their legal rights," the state court concluded, "and this purpose could reasonably be based upon the fact that prisoners have restricted access to the judicial system due to their confinement." *Id.*, at 748–749, 311 N. W. 2d, at 467.

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access to the court for purposes of bringing an action"); Me. Rev. Stat. Ann., Tit. 14, § 853 (Supp. 1988); Minn. Stat. § 541.15 (1988); Mo. Rev. Stat. § 516.170 (1986); Mont. Code Ann. § 27–2–401 (1987); Neb. Rev. Stat. § 25–213 (1985); N. D. Cent. Code § 28–01–25 (Supp. 1987); Ohio Rev. Code Ann. § 2305.16 (1981); Ore. Rev. Stat. § 12.160 (1987); R. I. Gen. Laws § 9–1–19 (Supp. 1988); S. C. Code § 15–3–40 (Supp. 1988); Vt. Stat. Ann., Tit. 12, § 551 (Supp. 1988); Va. Code § 8.01–229 (Supp. 1988) (limited to actions by "convict . . . against his committee"); Wash. Rev. Code § 4.16.190 (1987); Wis. Stat. § 893.16 (1985–1986). Accord, D. C. Code § 12–302 (1981).

[9] 1961 Mich. Pub. Acts, No. 236, § 5851 (effective Jan. 1, 1963).

The Court of Appeals for the Sixth Circuit nonetheless refused to apply the tolling provision to inmates' § 1983 suits in this case and in *Higley* v. *Michigan Department of Corrections*, 835 F. 2d 623 (1987). Although it recognized in *Higley* that it was "obligated to apply state tolling statutes to § 1983 actions, as long as the result is not inconsistent with federal law or policy," *id.*, at 624, the court held that "application of a lengthy tolling period is clearly counterproductive to sound federal policy in attempting to deal with § 1983 claims as promptly as practicable," *id.*, at 626–627.[10] Tolling is neither inconsistent with nor required by § 1983's goal of compensating persons whose constitutional rights have been violated, the court stated. Its result thus turned on two other interests, which it discussed in tandem: the settled § 1983 policy of deterring officials' unconstitutional behavior and a novel "rehabilitative function [of] providing a 'safety valve' for prisoner grievances."[11] *Id.*, at 626. Concluding that quick dis-

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[10] There is, of course, a federal interest in disposing of all litigation in the federal courts as expeditiously as possible. But the interest in prompt resolution of disputes is vindicated by all statutes of limitations and always must be balanced against the countervailing interest in allowing valid claims to be determined on their merits. Although there is no reason why Congress could not strike that balance in § 1983 cases by enacting a federal statute of limitations, it has not done so. Rather, at least since 1914, see *O'Sullivan* v. *Felix*, 233 U. S. 318, it has tacitly approved of the practice of relying on state legislatures to balance these conflicting interests. Thus, the interest in prompt adjudication cannot properly be characterized as a separate interest that is "inconsistent" with Michigan's tolling provision; rather, it is one of the interests that Michigan has weighed in arriving at the limitations policy that federal courts must borrow.

[11] The Court of Appeals derived this function from the following commentary by a District Court:

"We cannot help but believe that, in order to effect the rehabilitative purpose described above, as well as to deter prison officials from misconduct, quick resolution of disputes is vital. Promptness is even more important, we think, when a prisoner is complaining that his current incarcerators are violating, or have violated, his civil rights. To allow a prisoner one year after his release to bring his section 1983 suit neither would effect deterrence as to the alleged offender, nor rehabilitation as to the alleged position of § 1983 suits advances these latter policies, the court held that Michigan's tolling law is inconsistent with federal law and declined to apply it.

We do not agree with the Court of Appeals. A State's decision to toll the statute of limitations during the inmate's disability does not frustrate § 1983's compensation goal. Rather, it enhances the inmate's ability to bring suit and recover damages for injuries.[12] Nor does the State's decision to toll its statute of limitations hinder § 1983's deterrence interest. In the event an official's misconduct is ongoing, the plaintiff will have an interest in enjoining it; thus, the time during which the official will unknowingly violate the Constitution may well be short. The State also may have decided that if the official knows an act is unconstitutional, the risk that he or she might be haled into court indefinitely is more likely to check misbehavior than the knowledge that he or she might escape a challenge to that conduct within a brief period of time. The Court of Appeals may have overlooked this point in *Higley* because of its unfortunate intermeshing of § 1983's deterrence function with a dubious "rehabilitative function."[13]

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victim. Thus, so long as the state system erects no barriers to the federal courts, we regard application of the state disability tolling statute to be 'inconsistent' with federal law." *Vargas* v. *Jago*, 636 F. Supp. 425, 429 (SD Ohio 1986), quoted in *Higley* v. *Michigan Department of Corrections*, 835 F. 2d, at 626.

[12] While recognizing that Michigan's open-ended tolling provision occasionally may let an inmate who has been incarcerated for a long term file a complaint based on antiquated events, see Brief for Respondent 14, we doubt that this will occur frequently. The passage of time—during which memories may dim, witnesses depart, and evidence disappear—is not necessarily an advantage to the plaintiff. For it is the plaintiff who shoulders the burden of proof, and there is a vast difference between preserving the right to file a complaint and convincing a trier of fact that the complaint's allegations are true.

[13] The notion that there is a *federal* "rehabilitative" interest in having unmeritorious claims brought to the attention of federal judges simply as a means of reducing tension within the prison is meritless.

As the Sixth Circuit pointed out, *ibid.*, many prisoners are willing and able to file § 1983 suits while in custody. Thus, a State reasonably could decide that there is no need to enact a tolling statute applicable to such suits. Alternatively, a State reasonably might conclude that some inmates may be loathe to bring suit against adversaries to whose daily supervision and control they remain subject, or that inmates who do file may not have a fair opportunity to establish the validity of their allegations while they are confined. The Michigan tolling statute reflects a legislative decision to lessen any such difficulties by extending the time in which prisoners may seek recovery for constitutional injuries. Such a statute is consistent with § 1983's remedial purpose.[14]

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[14] In *Wilson* v. *Garcia*, 471 U. S. 261, 275 (1985), we also considered "federal interests in uniformity, certainty, and the minimization of unnecessary litigation" in holding that a State's statute of limitations for personal injury actions should be borrowed in all § 1983 cases. Respondent contends that these interests weigh against application of Michigan's tolling provision. Brief for Respondent 22–27. We disagree. Those interests are more pertinent to determining which state laws are appropriate than whether application of those laws fosters the policies of § 1983. Cf. *Chardon*, 462 U. S., at 657 (In *Board of Regents, University of New York* v. *Tomanio*, 446 U. S. 478 (1980), the Court "specifically rejected the argument that the federal interest in uniformity justified displacement of state tolling rules").

FINLEY *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-1973. Argued February 28, 1989—Decided May 22, 1989

Petitioner's decedents were killed when their plane struck electric power lines on its approach to a city-run airfield in San Diego. She filed the present action against the United States under the Federal Tort Claims Act (FTCA), 28 U. S. C. § 1346(b), claiming that the Federal Aviation Administration had been negligent in its operation and maintenance of runway lights and in its performance of air traffic control functions. Petitioner subsequently moved to amend her complaint to add state tort-law claims against both the city and the utility company that maintained the power lines. The District Court granted the motion and asserted "pendent" jurisdiction under *Mine Workers* v. *Gibbs*, 383 U. S. 715, concluding that "judicial economy and efficiency" favored trying the actions together, and that the claims arose "from a common nucleus of operative facts." The Court of Appeals reversed on interlocutory appeal, categorically rejecting pendent-party jurisdiction under the FTCA.

Held: The text of the FTCA—which provides in pertinent part that the federal district courts shall have jurisdiction over "civil actions on claims against the United States"—defines jurisdiction in a manner that does not reach defendants other than the United States. This Court's decision in *Aldinger* v. *Howard*, 427 U. S. 1, made explicit the nontransferability of *Gibbs* to the context of pendent-*party* jurisdiction. *Aldinger*, *Zahn* v. *International Paper Co.*, 414 U. S. 291, and *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365, establish that a grant of jurisdiction over claims involving particular parties does not confer jurisdiction over additional claims by or against different parties, even if consideration of the additional claims would promote "judicial economy and efficiency," and all of the claims "derive from a common nucleus of operative fact." Nor do the circumstances here suffice to establish "ancillary" jurisdiction. The unavailability of jurisdiction over the additional claims is unaltered by the exclusivity of federal jurisdiction under the FTCA, even though that may sometimes require separate suits in state and federal court. Finally, the 1948 revision of the Judicial Code, which changed the relevant language of the FTCA from "any claim against the United States" to its present form, does not suggest an affirmative grant of pendent-party jurisdiction, but is more naturally understood as a stylistic change reflecting the terminology of the Federal Rules of Civil Procedure. See Fed. Rule Civ. Proc. 2. Pp. 547–556.

Affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and KENNEDY, JJ., joined. BLACKMUN, J., filed a dissenting opinion, *post*, p. 556. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 558.

Joseph T. Cook argued the cause for petitioner. With him on the briefs was *Juanita M. Madole.*

Deputy Solicitor General Shapiro argued the cause for the United States. With him on the brief were *Solicitor General Fried, Assistant Attorney General Bolton, Richard G. Taranto, John F. Cordes,* and *Thomas M. Bondy.*

JUSTICE SCALIA delivered the opinion of the Court.

On the night of November 11, 1983, a twin-engine plane carrying petitioner's husband and two of her children struck electric transmission lines during its approach to a San Diego, California, airfield. No one survived the resulting crash. Petitioner brought a tort action in state court, claiming that San Diego Gas and Electric Company had negligently positioned and inadequately illuminated the transmission lines, and that the city of San Diego's negligent maintenance of the airport's runway lights had rendered them inoperative the night of the crash. When she later discovered that the Federal Aviation Administration (FAA) was in fact the party responsible for the runway lights, petitioner filed the present action against the United States in the United States District Court for the Southern District of California. The complaint based jurisdiction upon the Federal Tort Claims Act (FTCA), 28 U. S. C. § 1346(b), alleging negligence in the FAA's operation and maintenance of the runway lights and performance of air traffic control functions. Almost a year later, she moved to amend the federal complaint to include claims against the original state-court defendants, as to which no independent basis for federal jurisdiction existed. The District Court granted petitioner's motion and asserted "pendent" jurisdiction under *Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966), finding it "clear" that "judicial economy and efficiency" favored trying the actions together, and concluding that they arose "from a common nucleus of operative facts." App. to Pet. for Cert. A–8 to A–9. The District Court certified an interlocutory appeal to the Court of Appeals for the Ninth Circuit under 28 U. S. C. § 1292(b). That court summarily reversed on the basis of its earlier opinion in *Ayala* v. *United States*, 550 F. 2d 1196 (1977), cert. dism'd, 435 U. S. 982 (1978), which had categorically rejected pendent-party jurisdiction under the FTCA. We granted certiorari, 488 U. S. 815 (1988), to resolve a split among the Circuits on whether the FTCA permits an assertion of pendent jurisdiction over additional parties. Compare, *e. g.*, *Ayala* v. *United States*, *supra*, with *Lykins* v. *Pointer, Inc.*, 725 F. 2d 645 (CA11 1984), and *Stewart* v. *United States*, 716 F. 2d 755 (CA10 1982), cert. denied, 469 U. S. 1018 (1984).

The FTCA provides that "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States" for certain torts of federal employees acting within the scope of their employment. 28 U. S. C. § 1346(b). Petitioner seeks to append her claims against the city and the utility to her FTCA action against the United States, even though this would require the District Court to extend its authority to additional parties for whom an independent jurisdictional base—such as diversity of citizenship, 28 U. S. C. § 1332(a)(1)—is lacking.

In 1807 Chief Justice Marshall wrote for the Court that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied." *Ex parte Bollman*, 4 Cranch 75, 93 (1807). It remains rudimentary law that "[a]s regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it*. . . . To the extent that such action is not taken, the power lies dormant." *The Mayor* v. *Cooper*, 6 Wall. 247, 252 (1868) (emphasis added); accord, *Christianson* v. *Colt Industries Operating Co.*, 486 U. S. 800, 818 (1988); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 379–380 (1981); *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233–234 (1922); *Case of the Sewing Machine Companies*, 18 Wall. 553, 577–578, 586–587 (1874); *Sheldon* v. *Sill*, 8 How. 441, 449 (1850); *Cary* v. *Curtis*, 3 How. 236, 245 (1845); *McIntire* v. *Wood*, 7 Cranch 504, 506 (1813).

Despite this principle, in a line of cases by now no less well established we have held, without specific examination of jurisdictional statutes, that federal courts have "pendent" claim jurisdiction—that is, jurisdiction over nonfederal claims between parties litigating other matters properly before the court—to the full extent permitted by the Constitution. *Mine Workers* v. *Gibbs*, *supra; Hurn* v. *Oursler*, 289 U. S. 238 (1933); *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175 (1909).[1] *Gibbs*, which has come to stand for the principle in question, held that "[p]endent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ,' U. S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" 383 U. S., at 725 (emphasis in original). The requisite relationship exists, *Gibbs* said, when the federal and nonfederal claims "derive from a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them in one judicial proceeding." *Ibid.* Petitioner contends that the same criterion applies here, leading to the result that her state-law claims against San Diego Gas and Electric Company and the city of San Diego may be heard in conjunction with her FTCA action against the United States.

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[1] JUSTICE STEVENS apparently does not acknowledge the divergence in these lines of authority. Nothing else can explain the belief expressed in his dissent that there is force in the argument that "[i]f the Court's demonstration [of lack of statutory authority] were controlling, *Gibbs*, *Hurn*, and *Moore*, as well as a good many other cases, were incorrectly decided." *Post*, at 572. For that is entirely canceled by the equally valid argument that, if lack of statutory authority were *not* controlling, *Christianson*, *Firestone*, *Sewing Machine Companies*, and *McIntire*, as well as a good many other cases, were incorrectly decided.

Analytically, petitioner's case is fundamentally different from *Gibbs* in that it brings into question what has become known as pendent-*party* jurisdiction, that is, jurisdiction over parties not named in any claim that is independently cognizable by the federal court.[2] We may assume, without deciding, that the constitutional criterion for pendent-party jurisdiction is analogous to the constitutional criterion for pendent-claim jurisdiction, and that petitioner's state-law claims pass that test. Our cases show, however, that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly. In *Zahn* v. *International Paper Co.*, 414 U. S. 291, 301 (1973), we refused to allow a plaintiff pursuing a diversity action worth less than the jurisdictional minimum of $10,000 to append his claim to the jurisdictionally adequate diversity claims of other members of a plaintiff class—even though all of the *claims* would together have amounted to a single "case" under *Gibbs*, see *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365, 372 (1978). We based this holding upon "the statutes defining the jurisdiction of the District Court," 414 U. S., at 292, and did not so much as mention *Gibbs*.

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[2] JUSTICE STEVENS is thus mistaken to rely upon, *post*, at 559–560, n. 6, this Court's decision in *Moore* v. *New York Cotton Exchange*, 270 U. S. 593 (1926). That case involved jurisdiction over a counterclaim brought by and against parties who were already properly before the court on other, federal-question grounds. His dissent generally ignores this distinction—a central distinction, as we shall later discuss—between new parties and parties already before the court.

Two years later, the nontransferability of *Gibbs* to pendent-party claims was made explicit. In *Aldinger* v. *Howard*, 427 U. S. 1 (1976), the plaintiff brought federal claims under 42 U. S. C. § 1983 against individual defendants, and sought to append to them a related state claim against Spokane County, Washington. (A federal § 1983 claim was unavailable against the county because of this Court's decision in *Monroe* v. *Pape*, 365 U. S. 167 (1961).)[3] We specifically disapproved application of the *Gibbs* mode of analysis, finding a "significant legal difference." 427 U. S., at 15. "[T]he addition of a completely new party," we said, "would run counter to the well-established principle that federal courts . . . are courts of limited jurisdiction marked out by Congress." *Ibid.* "Resolution of a claim of pendent-party jurisdiction . . . calls for careful attention to the relevant statutory language." *Id.*, at 17. We held in *Aldinger* that the jurisdictional statute under which suit was brought, 28 U. S. C. § 1343, which conferred district court jurisdiction over civil actions of certain types "authorized by law to be commenced," did not mean to include as "authorized by law" a state-law claim against a party that had been statutorily insulated from similar federal suit. The county had been "*excluded* from liability in § 1983, and therefore by reference in the grant of jurisdiction under § 1343(3)." *Ibid.* (emphasis in original).

We reaffirmed and further refined our approach to pendent-party jurisdiction in *Owen Equipment & Erection Co.* v. *Kroger*, *supra*, at 372–375—a case, like *Zahn*, involving the diversity statute, 28 U. S. C. § 1332(a)(1), but focusing on the requirement that the suit be "between . . . citizens of different states," rather than the requirement that it "excee[d] the sum or value of $10,000." We held that the jurisdiction which § 1332(a)(1) confers over a "matter in controversy" between a plaintiff and defendant of diverse citizenship cannot be read to confer pendent jurisdiction over a different, nondiverse defendant, even if the *claim* involving that other defendant meets the *Gibbs* test. *"Gibbs,"* we said, "does not end the inquiry into whether a federal court has power to hear the nonfederal claims along with the federal ones. Beyond this constitutional minimum, there must be an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim," 437 U. S., at 373.

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[3] *Monroe* v. *Pape* was later overruled by *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978).

The most significant element of "posture" or of "context," *id.*, at 376, in the present case (as in *Zahn*, *Aldinger*, and *Kroger*) is precisely that the added claims involve added parties over whom no independent basis of jurisdiction exists. While in a narrow class of cases a federal court may assert authority over such a claim "ancillary" to jurisdiction otherwise properly vested—for example, when an additional party has a claim upon contested assets within the court's exclusive control, see, *e. g.*, *Krippendorf* v. *Hyde*, 110 U. S. 276 (1884); *Freeman* v. *Howe*, 24 How. 450, 460 (1861), or when necessary to give effect to the court's judgment, see, *e. g.*, *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 239 (1934); *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112–114 (1904)—we have never reached such a result solely on the basis that the *Gibbs* test has been met.[4] And little more basis than that can be relied upon by petitioner here. As in *Kroger*, the relationship between petitioner's added claims and the original complaint is one of "mere factual similarity," which is of no consequence since "neither the convenience of the litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction," 437 U. S., at 376–377. It is true that here, unlike in *Kroger*, see *id.*, at 376, the party seeking to bring the added claims had little choice but to be in federal rather than state court, since the FTCA permits the Federal Government to be sued only there. But that alone is not enough, since we have held that suits against the United States under the Tucker Act, 24 Stat. 505 (which can of course be brought only in federal court, see 28 U. S. C. §§ 1346(a)(2), 1491(a)(1)), cannot include private defendants. *United States* v. *Sherwood*, 312 U. S. 584 (1941).

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[4] This Court's decision in *Dewey* v. *West Fairmont Gas Coal Co.*, 123 U. S. 329 (1887), which JUSTICE STEVENS cites in his dissent, see *post*, at 560, n. 6, explicitly rested upon "ancillary" jurisdiction, citing *Krippendorf* v. *Hyde*, 110 U. S. 276 (1884), in support of its holding that "[t]he suit in equity was an exercise of jurisdiction . . . ancillary to that which it had already acquired in the action at law." 123 U. S., at 333. In *Dewey*, the new defendant added in the equitable counterclaim was asserted to have been the recipient of a fraudulent conveyance from the insolvent plaintiff, and the counterclaim was brought under a West Virginia statute authoriz-

The second factor invoked by *Kroger*, the text of the jurisdictional statute at issue, likewise fails to establish petitioner's case. The FTCA, § 1346(b), confers jurisdiction over "civil actions on claims against the United States." It does not say "civil actions on claims that include requested relief against the United States," nor "civil actions in which there is a claim against the United States"—formulations one might expect if the presence of a claim against the United States constituted merely a minimum jurisdictional requirement, rather than a definition of the permissible scope of FTCA actions. Just as the statutory provision "between . . . citizens of different States" has been held to mean citizens of different States and no one else, see *Kroger*, *supra*, so also here we conclude that "against the United States" means against the United States and no one else.[5] "Due regard for the rightful

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ing suits to set aside such conveyances in assistance of an anticipated judgment or decree against the conveying debtor. Any decree on the counterclaim would presumably have been worthless if the fraudulent conveyance could not have been recaptured.

[5] JUSTICE STEVENS would distinguish *Kroger* (and *Zahn* v. *International Paper Co.*, 414 U. S. 291 (1973)) from the present case on the

independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy* v. *Ratta,* 292 U. S. 263, 270 (1934); accord, *Executive Jet Aviation, Inc.* v. *Cleveland,* 409 U. S. 249, 272–273 (1972); *Shamrock Oil & Gas Corp.* v. *Sheets,* 313 U. S. 100, 108–109 (1941). The statute here defines jurisdiction in a manner that does not reach defendants other than the United States.[6]

Petitioner contends, however, that an affirmative grant of pendent-party jurisdiction is suggested by changes made to the jurisdictional grant of the FTCA as part of the comprehensive 1948 revision of the Judicial Code. See Pub. L. 773,

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ground that, where Congress "has unequivocally indicated its intent that the federal right be litigated in a federal forum, there is reason to believe that Congress did not intend that the substance of the federal right be diminished by the increased costs in efficiency and convenience of litigation in two forums." *Post,* at 577. It seems to us, however, that one could say precisely the same thing about the diversity jurisdiction involved in *Kroger* and *Zahn:* When Congress has unequivocally indicated its intent that a plaintiff have a right to bring a diversity action in federal court, there is reason to believe that Congress did not intend that the substance of that right be diminished, etc. We simply do not agree with the inference, in either context.

[6] JUSTICE STEVENS says that "it is perfectly clear that the District Court has . . . statutory power to decide this case," *post,* at 560—which is true if one means this case against the United States. His dissent then continues, however, "[i]t is also undisputed that this power will not be defeated by the joinder of two private defendants," *ibid.,* supporting that statement by references to Federal Rules of Civil Procedure 14(a) and 20(a), which permit the impleader and joinder of parties, *post,* at 560–561. Unfortunately, the proposition in that second sentence *is* disputed. Indeed, it is what this case is all about. More precisely, it is not that the "statutory power to decide this case" is *defeated* by the joinder of a private party for purposes of a claim over which the District Court has no independent jurisdiction, but that the statutory power to decide a case including such a claim simply does not exist, since the FTCA provides jurisdiction only for claims against the United States. Rules 14(a) and 20(a) in no way alter that reality, since the Federal Rules explicitly provide that they "shall not be construed to extend . . . the jurisdiction of the United States district courts," Fed. Rule Civ. Proc. 82.

62 Stat. 869. In its earlier form, the FTCA had conferred upon district courts "exclusive jurisdiction to hear, determine, and render judgment *on any claim* against the United States" for specified torts. 28 U. S. C. § 931 (1946 ed.) (emphasis added). In the 1948 revision, this provision was changed to "exclusive jurisdiction of *civil actions on claims* against the United States." 28 U. S. C. § 1346(b) (1952 ed.) (emphasis added). Petitioner argues that this broadened the scope of the statute, permitting the assertion of jurisdiction over any "civil action," so long as that action *includes* a claim against the United States. We disagree.

Under established canons of statutory construction, "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187, 199 (1912); see *United States* v. *Ryder*, 110 U. S. 729, 740 (1884). Concerning the 1948 recodification of the Judicial Code in particular, we have stated that "no changes in law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 227 (1957); see *Tidewater Oil Co.* v. *United States*, 409 U. S. 151, 162 (1972). We have found no suggestion, much less a clear expression, that the minor rewording at issue here imported a substantive change.

The change from "claim against the United States" to "civil actions on claims against the United States" would be a strange way to express the substantive revision asserted by petitioner—but a perfectly understandable way to achieve another objective. The 1948 recodification came relatively soon after the adoption of the Federal Rules of Civil Procedure, which provide that "[t]here shall be one form of action to be known as 'civil action.'" Fed. Rule Civ. Proc. 2. Consistent with this new terminology, the 1948 revision inserted the expression "civil action" throughout the provisions governing district-court jurisdiction. See H. R. Rep. No. 308, 80th Cong., 1st Sess., App. A114–A125 (1947) (Reviser's Notes).

Reliance upon the 1948 recodification also ignores the fact that the concept of pendent-party jurisdiction was not considered remotely viable until *Gibbs* liberalized the concept of pendent-claim jurisdiction—nearly 20 years later. See 13B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3567.2, pp. 146–148 (2d ed. 1984); Miller, Ancillary and Pendent Jurisdiction, 26 S. Tex. L. J. 1, 11 (1985). Indeed, in 1948 even a relatively limited substantive expansion of pendent-*claim* jurisdiction with respect to unfair competition actions provoked considerable discussion, see Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 232 (1948); Note, The Proposed Revision of the Federal Judicial Code, 60 Harv. L. Rev. 424, 430–431 (1947), and was described by the chief reviser as one of a dozen "major changes of law" effected by his handiwork, W. Barron, The Judicial Code 1948 Revision, 8 F. R. D. 439, 441–445 (1949). That change, in the already accepted realm of pendent-*claim* jurisdiction, was accomplished by wording that could not be mistaken, referring to "any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, or trademark laws." § 1338(b), 62 Stat. 931. It is inconceivable that the much more radical change of adopting pendent-party jurisdiction would have been effected by the minor and obscure change of wording at issue here—especially when that revision is more naturally understood as stylistic.

Because the FTCA permits the Government to be sued only in federal court, our holding that parties to related claims cannot necessarily be sued there means that the efficiency and convenience of a consolidated action will sometimes have to be forgone in favor of separate actions in state and federal courts. We acknowledged this potential consideration in *Aldinger*, 427 U. S., at 18, but now conclude that the present statute permits no other result.

* * *

As we noted at the outset, our cases do not display an entirely consistent approach with respect to the necessity that jurisdiction be explicitly conferred. The *Gibbs* line of cases was a departure from prior practice, and a departure that we have no intent to limit or impair. But *Aldinger* indicated that the *Gibbs* approach would not be extended to the pendent-party field, and we decide today to retain that line. Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts. All our cases—*Zahn*, *Aldinger*, and *Kroger*—have held that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties. Our decision today reaffirms that interpretive rule; the opposite would sow confusion.

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

JUSTICE BLACKMUN, dissenting.

If *Aldinger* v. *Howard*, 427 U. S. 1 (1976), required us to ask whether the Federal Tort Claims Act embraced "an affirmative grant of pendent-party jurisdiction," *ante*, at 553, I would agree with the majority that no such specific grant of jurisdiction is present. But, in my view, that is not the appropriate question under *Aldinger*. I read the Court's opinion in that case, rather, as requiring us to consider whether Congress has demonstrated an intent to *exempt* "the party as to whom jurisdiction pendent to the principal claim" is asserted from being haled into federal court. 427 U. S., at 16 (emphasis omitted). And, as those of us in dissent in *Aldinger* observed, the *Aldinger* test would be rendered meaningless if the required intent could be found in the failure of the relevant jurisdictional statute to mention the type of party in question, "because all instances of asserted pendent-party jurisdiction will by definition involve a party as to whom Congress has impliedly 'addressed itself' by not expressly conferring subject-matter jurisdiction on the federal courts." *Id.*, at 23 (BRENNAN, J., dissenting).

In *Aldinger,* the Court found the requisite intent to exclude municipalities from the relevant jurisdictional statute, because (the Court then thought) municipalities had been affirmatively excluded by Congress from the scope of 42 U. S. C. § 1983. In such a case, the Court barred the use of the pendent-party doctrine, for otherwise the doctrine would permit an end run around an express congressional limitation of federal power. See *id.*, at 16–17.

In the present case, I find no such substantive limitation. Nor, in my view, is there any other expression of congressional intent to exclude private defendants from federal tort claims litigation. *United States* v. *Sherwood,* 312 U. S. 584 (1941), is not to the contrary. There, this Court held that Congress did not intend under the Tucker Act to permit the district courts to adjudicate any cause of action that could not have been brought in the Court of Claims, an Article I court in which no private party could be a defendant. *Sherwood* did not turn solely on a canon of "conservatism which is appropriate in the case of a waiver of sovereign immunity." *Id.*, at 590. It turned also upon "the history of the Court of Claims' jurisdiction." *Id.*, at 590–591. There is no equivalent history of adjudication of tort claims against the United States in a tribunal without power to litigate the liability of private tortfeasors; thus, *Sherwood* does not require the result the Court reaches today.

In a case not controlled by any express intent to limit the scope of a constitutional "case," *Aldinger* suggests that the appropriateness of pendent-party jurisdiction might turn on the "alignmen[t] of parties and claims," and that one significant factor is whether "the grant of jurisdiction to [the] federal court is exclusive," 427 U. S., at 18, as is the situation here. Where, as here, Congress' preference for a federal forum for a certain category of claims makes the federal forum the *only* possible one in which the constitutional case may be heard as a whole, the sensible result is to permit the exercise of pendent-party jurisdiction. *Aldinger* imposes no obstacle to that result, and I would not reach out to create one. I therefore dissent.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The Court's holding is not faithful to our precedents and casually dismisses the accumulated wisdom of our best judges. As we observed more than 16 years ago, "numerous decisions throughout the courts of appeals since [*Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966),] have recognized the existence of judicial power to hear pendent claims involving pendent parties where 'the entire action before the court comprises but one constitutional "case"' as defined in *Gibbs*." *Moor* v. *County of Alameda*, 411 U. S. 693, 713 (1973). I shall first explain why the position taken by the overwhelming consensus of federal judges is correct and then comment on major flaws in the opinion the Court announces today.

I

Article III of the Constitution identifies the categories of "Cases" and "Controversies" that federal courts may have jurisdiction to decide.[1] If a case is not within one of the

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[1] Article III, § 2, provides in part:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants specified categories, neither Congress nor the parties may authorize a federal court to decide it.[2] Objections to a federal court's jurisdiction over the subject matter of a case cannot be waived.[3] Although Article III strictly confines the subject-matter jurisdiction of federal courts, it does not limit the extent of the courts' personal jurisdiction over individual parties[4] or their power to decide individual claims in cases within any of the specified categories.[5] A party beyond the reach of a federal court's process may voluntarily submit to its jurisdiction over his person, but he cannot create subject-matter jurisdiction—by waiver, estoppel, or the filing of a lawsuit—over a non-Article III case.[6]

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of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

[2] See, *e. g., Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 491 (1983); *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582, 646–655 (1949) (Frankfurter, J., dissenting).

[3] See, *e. g., Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702 (1982); *Sosna* v. *Iowa*, 419 U. S. 393, 398 (1975); *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379 (1884).

[4] See, *e. g., Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee, supra; Petrowski* v. *Hawkeye-Security Ins. Co.*, 350 U. S. 495 (1956).

[5] See, *e. g., Verlinden B. V.*, 461 U. S., at 491; *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824).

[6] "*Gibbs* concerned a state-law claim jurisdictionally pendent to one of federal law, but no reason appears why the identical principles should not equally apply to pendent state-law claims involving the joinder of additional parties. In either case the Art. III question concerns only the subject matter and not the *in personam* jurisdiction of the federal courts. In either case the question of Art. III power in the federal judiciary to exercise subject-matter jurisdiction concerns whether the claims asserted are such as 'would ordinarily be expected to [be tried] in one judicial proceeding,' and the question of discretion addresses 'considerations of judicial economy, convenience and fairness to litigants.'

"To recognize that the addition of parties under the pendent jurisdiction of the federal courts will sometimes alter the balance of 'judicial economy, convenience and fairness,' or sometimes threaten to embroil federal courts in the resolution of uncertain questions of state law, and thereby make the exercise of this discretionary jurisdiction inappropriate, is only to speak to the question of the proper exercise of judicial discretion in the circum-

The case before us today is one in which the United States is a party. Given the plain language of Article III, there is not even an arguable basis for questioning the federal court's constitutional power to decide it.[7] Moreover, by enacting the Federal Tort Claims Act (FTCA) in 1946, 28 U. S. C. § 1346(b), Congress unquestionably authorized the District Court to accept jurisdiction of "civil actions on claims against the United States." Thus, it is perfectly clear that the District Court has both constitutional and statutory power to decide this case.

It is also undisputed that this power will not be defeated by the joinder of two private defendants. Rule 14(a) of the Federal Rules of Civil Procedure expressly authorizes the defendant to implead joint tortfeasors,[8] and this Rule is appli-

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stances and does not vitiate the *Gibbs* analysis or its application to the question of pendent-party jurisdiction." *Aldinger* v. *Howard*, 427 U. S. 1, 20–21 (1976) (BRENNAN, J., dissenting) (footnote omitted).

See also Currie, Pendent Parties, 45 U. Chi. L. Rev. 753, 755 (1978); Fortune, Pendent Jurisdiction—The Problem of "Pendenting Parties," 33 U. Pitt. L. Rev. 1, 12 (1972); Schenkier, Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction, 75 Nw. U. L. Rev. 245, 281 (1980); Note, 64 B. U. L. Rev. 895, 942 (1985).

The Court has upheld the authority of a federal court to entertain counterclaims against a plaintiff, see *Moore* v. *New York Cotton Exchange*, 270 U. S. 593 (1926), and a third-party defendant, *Dewey* v. *West Fairmont Gas Coal Co.*, 123 U. S. 329 (1887), notwithstanding that the claims do not have an independent jurisdictional basis. See also *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365, 375 (1978) ("[T]he exercise of ancillary jurisdiction over nonfederal claims has often been upheld in situations involving impleader, cross-claims or counterclaims").

[7] Federal jurisdiction is supported not only by the fact that the case is one arising under a law of the United States, but also that it is a controversy to which the United States is a party. See *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 565 (1962) (opinion of Harlan, J.); *Minnesota* v. *Hitchcock*, 185 U. S. 373, 384–386 (1902); *Ortiz* v. *United States Government*, 595 F. 2d 65, 69–70 (CA1 1979).

[8] Rule 14(a) provides in part:

"At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served cable to FTCA cases.[9] Moreover, if the claim against nonfederal defendants had been properly brought in a federal court, those defendants could require the United States to defend their claim for contribution in that action.[10] The dispute between all the parties derives from a common nucleus of operative fact. There is accordingly ample basis for regarding this entire three-cornered controversy as a single "case" and for allowing petitioner to assert additional claims against the nonfederal defendants as she is authorized to do by Rule 20(a) of the Federal Rules.[11]

Prior to the adoption of the Federal Rules of Civil Procedure in 1938, the federal courts routinely decided state-law claims in cases in which they had subject-matter jurisdiction, see, *e. g.*, *Hurn* v. *Oursler*, 289 U. S. 238, 246 (1933); *Siler*

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upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff."

[9] "Of course there is no immunity from suit *by* the Government to collect claims for contribution due it from its joint tort-feasors. The Government should be able to enforce this right in a federal court not only in a separate action but by impleading the joint tort-feasor as a third-party defendant. See 3 Moore's Federal Practice (2d ed. 1948) 507, *et seq.* It is fair that this should work both ways." *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 551–552 (1951).

[10] "The Government contends that, even if the Federal Tort Claims Act carries the Government's consent to be sued in a separate action for contribution due a joint tort-feasor, it does not carry consent to be impleaded as a third-party defendant to meet such a claim.

"We find nothing in the nature of the rights and obligations of joint tort-feasors to require such a procedural distinction, nor does the Act state such a requirement. On the contrary, the Act expressly makes the Federal Rules of Civil Procedure applicable, and Rule 14 provides for third-party practice." *Id.*, at 553 (footnotes omitted).

[11] Rule 20(a) provides in part:

"All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action."

v. *Louisville & Nashville R. Co.*, 213 U. S. 175 (1909), and granted relief against nondiverse parties on state claims as to which there was no independent basis for federal jurisdiction, see, *e. g., Moore* v. *New York Cotton Exchange*, 270 U. S. 593 (1926); *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112–114 (1904); *Freeman* v. *Howe*, 24 How. 450, 460 (1861).[12] Although the contours of the federal cause of action—or "case"—were then more narrowly defined than they are today, see, *e. g., Hurn* v. *Oursler*, *supra*, the doctrine of "pendent" or "ancillary" jurisdiction had long been firmly established. The relevant change that was effectuated by the adoption of the Rules in 1938 was, in essence, a statutory broadening of the dimensions of the cases that federal courts may entertain.

The Court's unanimous opinion[13] in *Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966), highlights the modern conception of a "civil action" and a "constitutional case." At issue was the exercise of pendent jurisdiction over a state-law claim in an action brought under the Labor Management Relations Act, 1947.[14] We wrote:

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[12] See also *Dewey* v. *West Fairmont Gas Coal Co.*, 123 U. S. 329 (1887).

[13] Although Chief Justice Warren took no part in the decision and Justices Harlan and Clark wrote separately with respect to certain issues, JUSTICE BRENNAN's opinion on the jurisdictional issue was unanimous.

[14] Jurisdiction was asserted on the basis of § 303 of the Labor Management Relations Act, 1947, which provided:

"(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

"(b) Whoever shall be injured in his business or property by reason [of] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit." 61 Stat. 158, 29 U. S. C. § 187 (1964 ed.). See *Mine Workers* v. *Gibbs*, 383 U. S., at 717, n. 1.

"*Hurn* was decided in 1933, before the unification of law and equity by the Federal Rules of Civil Procedure. At the time, the meaning of 'cause of action' was a subject of serious dispute; the phrase might 'mean one thing for one purpose and something different for another.' *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 67–68. The Court in *Hurn* identified what it meant by the term by citation of *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, a case in which 'cause of action' had been used to identify the operative scope of the doctrine of *res judicata*. In that case the Court had noted that '"the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time."' 274 U. S., at 320.

. . . . .

"With the adoption of the Federal Rules of Civil Procedure and the unified form of action, Fed. Rule Civ. Proc. 2, much of the controversy over 'cause of action' abated. The phrase remained as the keystone of the *Hurn* test, however, and, as commentators have noted, has been the source of considerable confusion. Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged. Yet because the *Hurn* question involves issues of jurisdiction as well as convenience, there has been some tendency to limit its application to cases in which the state and federal claims are, as in *Hurn*, 'little more than the equivalent of different epithets to characterize the same group of circumstances.' 289 U. S., at 246.

"This limited approach is unnecessarily grudging. Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ,'

U. S. Const., Art III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." *Id.*, at 722–725 (emphasis in original; footnotes omitted).[15]

Immediately after *Gibbs* was decided,[16] federal judges throughout the Nation recognized that its reasoning applied to cases in which it was necessary to add an additional party on a pendent, nonfederal claim in order to grant complete relief. For example, Judge Henry Friendly considered this precise question in three separate opinions.[17] Because he is universally recognized not only as one of our wisest judges,[18] but also as one with special learning and expertise in matters of federal jurisdiction,[19] a reference to each of those opinions is appropriate.

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[15] The Court is correct to treat *Gibbs* as established law. See *ante*, at 548–549, 556. Just last Term we stated: "*Gibbs* establishes that the pendent jurisdiction doctrine is designed to enable courts to handle cases involving state-law claims in the way that will best accommodate the values of economy, convenience, fairness, and comity, and *Gibbs* further establishes that the judicial branch is to shape and apply the doctrine in that light." *Carnegie-Mellon Univ.* v. *Cohill*, 484 U. S. 343, 351 (1988). See also *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U. S. 804, 817, n. 15 (1986); *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 117 (1984); *Schmidt* v. *Oakland Unified School Dist.*, 457 U. S. 594 (1982); *Moor* v. *County of Alameda*, 411 U. S. 693 (1973). Cf. *Hagans* v. *Lavine*, 415 U. S. 528, 545–548 (1974); *Rosado* v. *Wyman*, 397 U. S. 397, 404–405 (1970).

[16] Although the Court suggests that "the concept of pendent-party jurisdiction was not considered remotely viable until *Gibbs* liberalized the concept of pendent-claim jurisdiction," *ante*, at 555, some courts exercised a form of pendent-party jurisdiction even prior to that decision. See, *e. g.*, *Borror* v. *Sharon Steel Co.*, 327 F. 2d 165 (CA3 1964); *Morris* v. *Gimbel Bros., Inc.* 246 F. Supp. 984 (ED Pa. 1965).

In *Leather's Best, Inc.* v. *S. S. Mormaclynx*, 451 F. 2d 800 (CA2 1971), Judge Friendly summarized the understanding of the *Gibbs* doctrine that prevailed in 1971, as follows:

> "To be sure, the *Gibbs* Court was not confronted with the question whether pendent jurisdiction extended to a state claim against a party not named in the federal claim. But as we have recently observed in Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F. 2d 627, 629 (2 Cir. 1971), 'Mr. Justice Brennan's language and the common sense considerations underlying it seem broad enough to cover that problem also. See Note, UMW v. Gibbs and Pendent Jurisdiction, 81 Harv. L. Rev. 657, 664 (1968).' In

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[17] The opinions were anticipated by Judge Friendly's opinions in *United States* v. *Heyward-Robinson Co.*, 430 F. 2d 1077, 1087 (CA2 1970) (concurring opinion), cert. denied, 400 U. S. 1021 (1971), involving permissive counterclaims, and *Astor-Honor, Inc.* v. *Grosset & Dunlap, Inc.*, 441 F. 2d 627 (CA2 1971), upholding pendent-party jurisdiction under 28 U. S. C. § 1338(b).

[18] In 1963, Justice Frankfurter regarded him "as the best judge now writing opinions on the American scene," see Freund, In Memoriam: Henry J. Friendly, 99 Harv. L. Rev. 1709, 1720 (1986); Erwin Griswold has described him as "the ablest lawyer of my generation," *ibid.*, and Judge Posner called him "the greatest federal appellate judge of his time," *id.*, at 1724.

[19] See H. Friendly, Federal Jurisdiction: A General View (1973); see also, Paul Freund's comments in 99 Harv. L. Rev., at 1716–1718, and David Currie's comments in On Blazing Trails: Judge Friendly and The Federal Jurisdiction, 133 U. Pa. L. Rev. 5 (1984). The authors of Hart & Wechsler's The Federal Courts and The Federal System, who dedicated the first two editions of the book to Justice Frankfurter and Professor Henry M. Hart, Jr., respectively, dedicate the third edition to Judge Friendly whom they describe as "man for all seasons in the law; master of this subject." P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and The Federal System xix (3d ed. 1988).

> that decision, involving federal claims under the copyright laws and state claims of unfair trade practice and unfair competition, including a defendant not named in the copyright claims, we held that a federal court had power to hear a state claim against a party not named in the federal claim, provided the *Gibbs* test was met, noting that this conclusion was buttressed by our decisions concerning ancillary jurisdiction to entertain compulsory counterclaims under F. R. Civ. P. 13(a), United Artists Corp. v. Masterpiece Productions, Inc., 221 F. 2d 213 (2 Cir. 1955), and third-party claims under F. R. Civ. P. 14(a), Dery v. Wyer, 265 F. 2d 804 (2 Cir. 1959)." *Id.*, at 809–810.

It is noteworthy that in his *Leather's Best* opinion, Judge Friendly relied, in part, on the Federal Rules of Civil Procedure, just as JUSTICE BRENNAN had done in the *Gibbs* opinion itself. Indeed, in another paragraph of his opinion, Judge Friendly concluded that the 1966 amendments to the Rules made it appropriate to extend the ancillary jurisdiction doctrine to the admiralty context as well as to ordinary civil cases.[20] In another opinion in 1971, he unequivocally concluded that "the doctrine of pendent jurisdiction is sufficiently broad to support a claim within the limits of *Gibbs* against a person not a party to the primary, jurisdiction-granting claim." *Almenares* v. *Wyman*, 453 F. 2d 1075, 1083 (CA2 1971), cert. denied, 405 U. S. 944 (1972).[21]

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[20] "It is true that in those cases, as well as in *Astor-Honor*, [441 F. 2d 627 (CA2 1971),] the federal claim had arisen in the ordinary civil jurisdiction, whereas the federal claim in this action had been brought under the admiralty jurisdiction. At an earlier date, this difference might have affected our decision here. But the rules of procedure in the admiralty and civil jurisdictions were merged in 1966, and we are of the opinion that at least since that merger, the constitutional rationale which underlies the doctrine of ancillary jurisdiction in the context of Rule 13(a) and Rule 14 may be applied to support the conclusion that a federal court has the power to hear a related state claim against a defendant not named in the federal claim regardless of whether the federal claim arises in the civil or admiralty jurisdiction. Thus, we conclude that in a case such as this, where the facts underlying the state and federal claims are identical, a federal court vested with admiralty jurisdiction over a shipper's claim against the carrier for breach of contract of carriage does have the 'power' also to entertain its state tort claim against a pier operator." *Leather's Best, Inc.* v. *S. S. Mormaclynx*, 451 F. 2d 800, 810–811 (CA2 1971) (footnotes omitted).

Before Judge Friendly addressed this issue for the third time, we decided *Aldinger* v. *Howard*, 427 U. S. 1 (1976). In that case, after declining to announce any general rule governing pendent-party jurisdiction, we held that such jurisdiction should not be exercised if Congress has "expressly or by implication negated its existence" in the statute granting subject-matter jurisdiction over the particular claim before the Court. *Id.*, at 18–19. Specifically, we concluded that the Civil Rights Acts, as then interpreted, precluded the joinder of a municipal corporation as a defendant to a claim asserted pursuant to 42 U. S. C. § 1983 or to a state-law claim pendent to such a federal claim. Although a reasonable argument can be made that the Court misconstrued the intent of Congress in that case, see 427 U. S., at 23–37 (BRENNAN, J., dissenting), there surely can be no quarrel with the proposition that Congress may withdraw or deny pendent jurisdiction over particular claims or parties.

In his third "pendent-party" opinion, Judge Friendly correctly described the limited scope of our holding in *Aldinger*. He wrote:

> "Although the *Aldinger* Court disapproved of the joinder of a pendent party defendant in the case before it, the

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[21] Relying on an earlier opinion authored by then-Judge Blackmun, *Hatridge* v. *Aetna Casualty & Surety Co.*, 415 F. 2d 809 (CA8 1969), the Court of Appeals for the Eighth Circuit in 1973 advanced this additional reason for not excluding pendent-party jurisdiction from the *Gibbs* doctrine:

"'[I]t would be an unjustifiable waste of judicial and professional time—indeed, a travesty on sound judicial administration—to allow plaintiff to try his [federal and state claims against certain codefendants] in Federal court but to require him to prosecute a claim involving precisely the same facts against [a codefendant joined pursuant only to the pendent state-law claim] in a State court.'" *Schulman* v. *Huck Finn, Inc.*, 472 F. 2d 864, 866 (1973) (quoting 350 F. Supp. 853, 858 (Minn. 1972)).

> Court explicitly limited its conclusion to 'the issue of so-called "pendent party" jurisdiction with respect to a claim brought under [28 U. S. C.] § 1343(3) and [42 U. S. C. §] 1983,' [427 U. S.,] at 18, . . . and noted that '[o]ther statutory grants and other alignments of parties and claims might call for a different result,' *id.*, and that 'it would be as unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction,' *id.*
>
> "The circumstances here are about as powerful for the exercise of pendent party jurisdiction as can be imagined. The exclusivity of federal jurisdiction over claims for violation of the Securities Exchange Act makes a federal court the only one where a complete disposition of federal and related state claims can be rendered. Cf. the Court's comment in *Aldinger* that '[w]hen the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U. S. C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in federal court may all of the claims be tried together,' 427 U. S. at 18. . . ." *Weinberger* v. *Kendrick*, 698 F. 2d 61, 76–77 (CA2 1982), cert. denied, 464 U. S. 818 (1983).

In the *Weinberger* case the circumstances were "about as powerful for the exercise of pendent party jurisdiction as can be imagined" because Congress had vested the federal courts with exclusive jurisdiction over claims arising under the Securities Exchange Act. The Federal District Court was therefore the only forum in which the entire constitutional case could be tried at one time. That powerful circumstance is also present in cases arising under the FTCA. In fact, in dicta, the *Aldinger* Court suggested that pendent-party jurisdiction might be available under the FTCA for precisely this reason. 427 U. S., at 18.

I would thus hold that the grant of jurisdiction to hear "civil actions on claims against the United States" authorizes the federal courts to hear state-law claims against a pendent party. As many other judges have recognized,[22] the fact that such claims are within the exclusive federal jurisdiction, together with the absence of any evidence of congressional disapproval of the exercise of pendent-party jurisdiction in FTCA cases,[23] provides a fully sufficient

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[22] In *Moor*, 411 U. S., at 713–714, in 1973, we noted that the Ninth Circuit rule denying pendent-party jurisdiction "stands virtually alone against this post-*Gibbs* trend in the courts of appeals." An overwhelming number of judges adhered to that view after *Aldinger* was decided. See, *e. g.*, *Dick Meyers Towing Service, Inc* v. *United States*, 577 F. 2d 1023 (CA5 1978), cert. denied, 440 U. S. 908 (1979); *Ortiz* v. *United States Government*, 595 F. 2d 65 (CA1 1979); *Edwards* v. *United States*, 672 F. Supp. 910 (ED Va. 1987); *Kennedy* v. *United States*, 643 F. Supp. 1072 (EDNY 1986); *Verdi* v. *United States*, 636 F. Supp. 114 (EDNY 1986); *Fried* v. *United States*, 579 F. Supp. 1212 (ND Ill. 1983); *Kattner* v. *United States*, 585 F. Supp. 240 (ED Tex. 1984); *Rogers* v. *United States*, 568 F. Supp. 894 (EDNY 1983); *DeBellas* v. *United States*, 542 F. Supp. 999 (SDNY 1982); *Johnston* v. *United States*, 546 F. Supp. 879 (Kan. 1982); *Obenshain* v. *Halliday*, 504 F. Supp. 946 (ED Va. 1980); *Dumansky* v. *United States*, 486 F. Supp. 1078 (NJ 1980); *Pearce* v. *United States*, 450 F. Supp. 613 (Kan. 1978); *Wood* v. *Standard Products Co.*, 456 F. Supp. 1098 (ED Va. 1978); *Maltais* v. *United States*, 439 F. Supp. 540 (NDNY 1977).

[23] "[W]e find no congressional disapproval of the exercise of such pendent party jurisdiction in the FTCA. The waiver of immunity, granting jurisdiction to the federal district courts of such tort suits against the Government, was made in 'sweeping language.' *United States* v. *Yellow Cab Co.*, 340 U. S. 543 (1951). Moreover the grant of jurisdiction was made exclusively to the federal courts. Thus there is no indication that Congress declined to extend federal jurisdiction over such a pendent party as was the case in *Aldinger*.

"We hold, therefore, that subject matter jurisdiction in the district court existed of the claim against Nuss as one over which the district court properly exercised jurisdiction, pendent to the claim against the Government justification for applying the holding in *Gibbs* to this case.[24]

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under the FTCA over which the federal court has exclusive jurisdiction." *Stewart* v. *United States*, 716 F. 2d 755, 757–759 (CA10 1982) (footnote and citation omitted), cert. denied, 469 U. S. 1018 (1984).

In *Lykins* v. *Pointer, Inc.*, 725 F. 2d 645 (CA11 1984), another Court of Appeals reached the same conclusion:

"Turning first to a consideration of 28 U. S. C. § 1346(b), the statute granting federal jurisdiction over plaintiff's tort claim against the United States, we find no express or implied negation of the federal courts' power to hear pendent party claims when that statute is invoked to confer jurisdiction on the district court. In this respect this case is distinguishable from *Kroger* and *Aldinger*. . . .

. . . . .

"No such indicia of a restrictive legislative intent toward pendent party jurisdiction exist here. Neither the FTCA nor its jurisdiction-granting statute contains any express proscription of such jurisdiction, and the statute has not spawned any restrictive judicial interpretations that could have been tacitly embraced by Congress. *Ortiz*, 595 F. 2d at 73.[4]" *Id.*, at 647–648.

In footnote 4, the court wrote:

"In addition, the primary purpose of the FTCA is to 'avoid injustice to those having meritorious claims hitherto barred by sovereign immunity.' *United States* v. *Muniz*, 374 U. S. 150, 154. . . . This goal reflects a congressional attitude sensitive to plaintiffs seeking recovery, one which is furthered by permitting plaintiffs to pursue in a single lawsuit their claims for injuries suffered in a single accident. As the Supreme Court noted in *Aldinger*, since Congress in section 1346(b) granted the district courts exclusive jurisdiction, only in federal court can all such claims be heard together. 427 U. S. at 18. . . ." *Id.*, at 648, n. 4.

[24] The Government argues that the panoply of special rules applicable to claims against the United States "underscores the importance of respecting the single-party limit on the jurisdictional grant of 28 U. S. C. 1346(b)." Brief for United States 30. It notes that an FTCA claim against the Government must be tried without a jury whereas pendent state-law claims would generally be subject to trial by jury under the Seventh Amendment; that the Government cannot be held liable for punitive damages or on a strict-liability theory whereas both may be available against a private party; that the Government has numerous defenses and immunities not available to a private party; and that a claimant against the Government under the FTCA must comply with the Act's administrative claim

II

The Court's contrary conclusion rests on an insufficient major premise, a failure to distinguish between diversity and federal-question cases, and an implicit reliance on a narrow view of the waiver of sovereign immunity in the FTCA.[25]

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procedures. *Id.*, at 29–30. That submission ignores the fact that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Mine Workers* v. *Gibbs*, 383 U. S., at 726; see *Moor* v. *County of Alameda*, 411 U. S., at 716–717. While the presence of any of these factors in a particular case may weigh against the exercise of pendent jurisdiction, they certainly do not deprive the court of the power to hear the pendent claim. The *Yellow Cab* Court provided sufficient answer in response to a similar complaint regarding the impleader of the United States in an action between private parties:

> "Such difficulties are not insurmountable. If, for example, a jury had been demanded in the *Yellow Cab* case, the decision of jury and nonjury issues could have been handled in a manner comparable to that used when issues of law are tried to a jury and issues of an equitable nature in the same case are tried by the court alone. If special circumstances had demonstrated the inadvisability, in the first instance, of impleading the United States as a third-party defendant, the leave of court required by Rule 14 could have been denied. If, at a later stage, the situation had called for a separation of the claims, the court could have ordered their separate trial. Fed. Rules Civ. Proc., 42(b). The availability of third-party procedure is intended to facilitate, not to preclude, the trial of multiple claims which otherwise would be triable only in separate proceedings. The possibility of such procedural difficulties is not sufficient ground for so limiting the scope of the Act as to preclude its application to all cases of contribution or even to all cases of contribution arising under third-party practice." *United States* v. *Yellow Cab Co.*, 340 U. S., at 555–556.

[25] The Court notes that the 1948 recodification of the Judicial Code, which amended the jurisdictional grant in the FTCA to provide for "'*civil actions* on claims against the United States,'" came relatively soon after the adoption of the Federal Rules of Civil Procedure, providing that "'[t]here shall be one form of action to be known as "civil action."'" *Ante*, at 554 (quoting Fed. Rule Civ. Proc. 2). The Court, however, rejects reliance on the plain meaning of the words "civil action"—which after all might explain the assertion of pendent-claim, as well as pendent-party, jurisdiction, see Freer, A Principled Statutory Approach to Supplemental Jurisdiction, 1987 Duke L. J. 34, 56–58—on the basis of dubious legislative history that the revisers did not intend to effect such a radical change through "the minor and ob-

The Court treats the absence of an affirmative grant of jurisdiction by Congress as though it constituted the kind of implicit rejection of pendent jurisdiction that we found in *Aldinger* v. *Howard*, 427 U. S. 1 (1976). Its opinion laboriously demonstrates that the FTCA "defines jurisdiction in a manner that does not reach defendants other than the United States," *ante*, at 553, and that the language of the statute cannot be construed as "adopting pendent-party jurisdiction," *ante*, at 555. That, of course, is always the predicate for the question whether a federal court may rely on the doctrine of ancillary or pendent jurisdiction to fill a gap in the relevant jurisdictional statute. If the Court's demonstration were controlling, *Gibbs*, *Hurn*, and *Moore*, as well as a good many other cases, were incorrectly decided.[26]

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scure change of wording at issue here." *Ante*, at 555. The authorities the Court cites do not support this proposition. See W. Barron, The Judicial Code 1948 Revision, 8 F. R. D. 439, 442 (1949) (characterizing § 1338(b) as "statutory confirmation of the jurisdiction of federal courts").

Ironically, the Court does not rely on the legislative history that could support its judgment. The legislative history of the FTCA indicates that Congress may have originally intended that the United States not be joined as a defendant in an action with private parties. The House Report on an earlier version of what eventually became the FTCA thus stated: "The bill therefore does not permit any person to be joined as a defendant with the United States and does not lift the immunity of the United States from tort actions except as jurisdiction is specifically conferred upon the district courts by this bill. (See *United States* v. *Sherwood*, 312 U. S. 584 (1941); *Lynn* v. *United States*, 110 F. (2d) 586, 588 (C. C. A. 5th 1940); *Waite* v. *United States*, 57 C. Cls. 546 (1922); *Jackson* v. *United States*, 27 C. Cls. 74, 84 (1891))." H. R. Rep. No. 1287, 79th Cong., 1st Sess., 5 (1945). The Court in *Yellow Cab* rejected the identical argument, noting that those statements "were entirely omitted from even the sectional analysis of the measure when in 1946 it was incorporated in the Reorganization Bill and the report on it was made by the Senate Committee on the Organization of Congress." 340 U. S., at 551–552, and n. 8. The Government here has not offered sufficient reason to reject the *Yellow Cab* Court's understanding of that legislative history.

[26] The Court is mistaken in asserting that this approach is somehow inconsistent with the principle that a court does not have subject-matter

In *Aldinger*, we adopted a rule of construction that assumed the existence of pendent jurisdiction unless "Congress in the statutes conferring jurisdiction has . . . expressly or by implication negated its existence," 427 U. S., at 18.[27] We rejected the assertion of pendent-party jurisdiction there because it arose "not in the context of congressional silence or tacit encouragement, but in quite the opposite context." *Id.*, at 15–16.[28] Congress' exclusion of municipal corporations from the definition of persons under § 1983, we concluded, evinced an intent to preclude the exercise of federal-court jurisdiction over them. If congressional silence were sufficient to defeat pendent jurisdiction, the careful reasoning in our *Aldinger* opinion was wholly unnecessary, for obviously the civil rights statutes do not affirmatively authorize the joinder of any state-law claims.

A similar approach, focusing on a legislative intent to bar a party from federal court, guided our analysis in *Zahn* v. *International Paper Co.*, 414 U. S. 291 (1973), and *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365 (1978).

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jurisdiction over an action unless an Act of Congress has supplied it. The District Court clearly had jurisdiction over this case, and the only question is the scope of its authority to consider specific claims.

[27] See also *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S., at 373.

[28] Although we did state in *Aldinger* that " 'the addition of a completely new party would run counter to the well-established principle that federal courts . . . are courts of limited jurisdiction marked out by Congress,' " *ante*, at 550 (quoting *Aldinger*, 427 U. S., at 15), the Court is incorrect to suggest that we found from that principle a "significant legal difference" between the addition of claims and the addition of parties. That statement came in the context of the discussion of the "purely factual" differences in efficiency between the two situations—concerns which the Court accurately notes do not go to the power to exercise pendent jurisdiction. The only legal difference the *Aldinger* Court identified was one of statutory construction. In § 1343 and § 1983, as opposed to the statutes under which the Court had exercised pendent-claim jurisdiction, "Congress ha[d] addressed itself to the party as to whom jurisdiction pendent to the principal claim [was] sought" and expressly excluded it from federal jurisdiction. 427 U. S., at 16.

In *Zahn*, we surveyed the "firmly rooted" law that "multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement for suit in federal courts," 414 U. S., at 294, and refused to adopt a rule that would allow putative plaintiffs who could not meet the jurisdictional amount to assert claims pendent to jurisdictionally sufficient claims. We noted that adoption of such a rule "would undermine the purpose and intent of Congress in providing that plaintiffs in diversity cases must present claims in excess of the specified jurisdictional amount" and would depart from "the historic construction of the jurisdictional statutes, left undisturbed by Congress over these many years." *Id.*, at 301. In *Kroger*, the rule at issue was the requirement that a plaintiff invoking diversity jurisdiction plead complete diversity. After noting the historical evidence demonstrating "a congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant," 437 U. S., at 374, we held that that jurisdictional requirement could not be circumvented through the exercise of pendent jurisdiction.[29]

The Court today adopts a sharply different approach. Without even so much as acknowledging our statement in *Aldinger* that before a federal court may exercise pendent-party jurisdiction it must satisfy itself that Congress "has not expressly or by implication negated its existence," 427 U. S., at 18, it now instructs that "a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties." *Ante*, at 556. This rule, the Court asserts, is necessary to provide Congress "a background of clear interpretative rules" and to avoid sowing confusion. *Ibid.* But as a method of statutory interpretation, the Court's approach is neither clear nor faithful to our judicial obligation to discern congressional intent. While with respect to the joinder of additional defendants on pendent state claims, the Court's mandate is now clear, its approach offers little guidance with respect to the many other claims that a court must address in the course of deciding a constitutional case. Because the Court provides no reason why the joinder of pendent defendants over whom there is no other basis of federal jurisdiction should differ from the joinder of pendent claims and other pendent parties,[30] I fear that its approach will confuse more than it clari-

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[29] We stated:

"The relevant statute in this case, 28 U. S. C. § 1332(a)(1), confers upon federal courts jurisdiction over 'civil actions where the matter in controversy exceeds the sum or value of $10,000 . . . and is between . . . citizens of different States.' This statute and its predecessors have consistently been held to require complete diversity of citizenship. That is, diversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff. Over the years Congress has repeatedly reenacted or amended the statute conferring diversity jurisdiction, leaving intact this rule of complete diversity. Whatever may have been the original purposes of diversity-of-citizenship jurisdiction, this subsequent history clearly demonstrates a congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant." *Kroger*, 437 U. S., at 373–374.

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[30] Consider, for example, the counterclaim cases in which the Federal Rules of Civil Procedure defined the scope of the jurisdiction granting statute in precisely the same way the Rules did in *Gibbs:*

"We conclude that, in the case of a counterclaim which is compulsory, ancillary jurisdiction should extend to additional parties, regardless of an ensuing lack of diversity. This is the position taken by the commentators, Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure, supra, 45 Yale L.J. 393, 418, and the few courts which have ruled on the question. Carter Oil Co. v. Wood, supra, D.C.E.D. Ill., 30 F.Supp. 875; King v. Edward B. Marks Music Corp., D.C.S.D.N.Y., 56 F.Supp. 446; and see Black v. London Assur. Co. of London, England, D.C.W.D.S.C., 122 F.Supp. 330, where the court arrived at the desired result through realignment of the parties. We ourselves have come to the same conclusion in the past on the similar issue of venue requirements for additional defendants, see Lesnik v. Public Industrials Corp., supra, 2 Cir., 144 F.2d 968, and with respect to impleader of third-party defendants under F.R. 14. Friend v. Middle Atlantic Transp. Co., 2 Cir., 153 F.2d 778, 779–780, certiorari denied 328 U. S. 865, 66 S.Ct. 1370, 90 L.Ed. 1635. A liberal attitude toward the inclusion of parties is a necessary confies. How much more clear to assume—especially when the courts have long so held—that with respect to all of these situations Congress intended the Federal Rules to govern unless Congress has indicated otherwise.

The Court's focus on diversity cases may explain why it loses sight of the purpose behind the principle of pendent jurisdiction.[31] The doctrine of pendent jurisdiction rests in part on a recognition that forcing a federal plaintiff to litigate his or her case in both federal and state courts impairs the ability of the federal court to grant full relief, *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, 367 (1921), and "imparts a fundamental bias against utilization of the federal forum owing to the deterrent effect imposed by the needless requirement of duplicate litigation if the federal forum is chosen." *Aldinger*, 427 U. S., at 36 (BRENNAN, J., dissenting).[32] "The courts, by recognizing pendent jurisdiction, are

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comitant to the liberalized third-party practice authorized by the Federal Rules of Civil Procedure. The presence of these defendants is necessary to a complete adjudication of the issues involved in this litigation, which should not be retried at another time in another forum." *United Artists Corp.* v. *Masterpiece Productions, Inc.*, 221 F. 2d 213, 217 (CA2 1955).

[31] The unwisdom of having "lumped together indiscriminately cases involving each of the three different contexts in which the question of pendent parties has been litigated" has been sufficiently criticised by Professors Wright, Miller, and Cooper. See their treatise on Federal Practice and Procedure § 3567.2, pp. 152–153 (2d ed. 1984). They explain:

"The distinctions are there and do not become less real because they are not mentioned. The meaning of 'amount in controversy' in § 1332 raises one question, the meaning of 'between citizens of different states' in the same statute raises a different question, and the permissible scope of cases 'arising under' federal law within the Constitution and § 1331 raises still a third question. The considerations for allowing 'pendent parties' in a federal question case may well be more compelling than for doing so when the only effect is to broaden the scope—and attractiveness—of diversity jurisdiction."

[32] See P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and The Federal System 1046 (3d ed. 1988); Fortune, Pendent Jurisdiction—The Problem of "Pendenting Parties," 34 U. Pitt. L. Rev. 1, 12 (1972); Mishkin, The Federal "Question" in the Dis-

effectuating Congress' decision to provide the plaintiff with a federal forum for litigating a jurisdictionally sufficient claim." Miller, Ancillary and Pendent Jurisdiction, 26 S. Tex. L. J. 1, 4 (1985). This is especially the case when, by virtue of the grant of exclusive federal jurisdiction, "*only* in a federal court may all of the claims be tried together." *Aldinger*, 427 U. S., at 18. In such circumstances, in which Congress has unequivocally indicated its intent that the federal right be litigated in a federal forum, there is reason to believe that Congress did not intend that the substance of the federal right be diminished by the increased costs in efficiency and convenience of litigation in two forums. Cf. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 25 (1983); *Will* v. *Calvert Fire Ins. Co.*, 437 U. S. 655, 673–675 (1978) (BRENNAN, J., dissenting).[33] No such special federal interest is present when federal jurisdiction is invoked on the basis of the diverse citizenship of the parties and the state-law claims may be litigated in a state forum. See *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S., at 376; Currie, The Federal Courts and the American Law Institute, 36 U. Chi. L. Rev. 1, 21 (1968).[34] To be sure "[w]hatever we say regarding the scope of jurisdiction conferred by a particular statute can . . . be changed by Con-

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trict Courts, 53 Colum. L. Rev. 157, 167 (1953); Schenkier, Ensuring Access to the Federal Courts: A Revised Rationale for Pendent Jurisdiction, 75 Nw. U. L. Rev. 245, 254–256 (1980).

[33] See also *Musher Foundation* v. *Alba Trading Co.*, 127 F. 2d 9, 11 (CA2 1942) (Clark, J., dissenting) ("If the roast must be reserved exclusively for the federal bench, it is anomalous to send the gravy across the street to the state court house").

[34] "The continued need for exercise of diversity jurisdiction, at least where a showing of prejudice is not made, has been challenged by respected authorities. But a sharply different view has been taken of the federal-question jurisdiction, and the Court has reflected that view in its decisions upholding the exercise of jurisdiction over pendent claims under state law." *Zahn* v. *International Paper Co.*, 414 U. S. 291, 304, n. 5 (1973) (BRENNAN, J., dissenting).

gress," *ante*, at 556, but that does not relieve us of our responsibility to be faithful to the congressional design. The Court is quite incorrect to presume that because Congress did not sanction the exercise of pendent-party jurisdiction in the diversity context, it has not permitted its exercise with respect to claims within the exclusive federal jurisdiction.

Finally, the Court seeks to draw support from *United States* v. *Sherwood*, 312 U. S. 584 (1941), a case that involved a narrow issue[35] and a narrow construction of the jurisdiction conferred by the Tucker Act.[36] The Court's holding was based partly on the special history of the Court of Claims, see *id.*, at 587, and partly on the view that the sovereign's consent to be sued "must be strictly interpreted," *id.*, at 590. Fortunately, after the enactment of the FTCA in 1946, the Court took a much more enlightened view of the waiver of sovereign immunity effected by that statute. Thus, in its decision upholding jurisdiction of a claim against the United States for contribution—incidentally, a claim that was not expressly covered by the Act—the Court wrote:

> "This brings the instant cases within the principle approved in *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 383:
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> "'In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson* v.

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[35] The Court held that the Tucker Act should not be construed to give the consent of the United States to be sued in effect as a postjudgment garnishee on a claim that in the hands of the judgment debtor would not be within its jurisdiction.

[36] Professor Moore convincingly argues that the *Sherwood* decision is based on an unsound and outdated application of the maxim that sovereign consent to be sued must be strictly construed. See 3A J. Moore, J. Lucas, & G. Grotheer, Moore's Federal Practice ¶20.07(3), pp. 20–55 to 20–58 (2d ed. 1987).

Hayes Construction Co., 243 N. Y. 140, 147, 153 N. E. 28, 29–30: "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."'

"Once we have concluded that the Federal Tort Claims Act covers an action for contribution due a tort-feasor, we should not, by refinement of construction, limit that consent to cases where the procedure is by separate action and deny it where the same relief is sought in a third-party action. As applied to the State of New York, Judge Cardozo said in language which is apt here: 'No sensible reason can be imagined why the State, having consented to be sued, should thus paralyze the remedy.' 243 N. Y. at 147, 153 N. E. at 29. 'A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. . . . When authority is given, it is liberally construed.' *United States* v. *Shaw*, 309 U. S. 495, 501." *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 554–555 (1951).[37]

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[37] See also *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 709 (1949) (Frankfurter, J., dissenting) ("In the course of a century or more a steadily expanding conception of public morality regarding 'governmental responsibility' has led to a 'generous policy of consent for suits against the government' to compensate for the negligence of its agents as well as to secure obedience to its contracts"); *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 59 (1944) (Frankfurter, J., dissenting) ("[C]onsent does not depend on some ritualistic formula. Nor are any words needed to indicate submission to the law of the land. The readiness or reluctance with which courts find such consent has naturally been influenced by prevailing views regarding the moral sanction to be attributed to a State's freedom from suability. Whether this immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract legal grounds, it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly,

Today we should be guided by the wisdom of Cardozo and Friendly rather than by the "unnecessarily grudging" approach that was unanimously rebuffed in *Gibbs*. See 383 U. S., at 725.

I respectfully dissent.

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courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government and to confirm Maitland's belief, expressed nearly fifty years ago, that 'it is a wholesome sight to see "the Crown" sued and answering for its torts' ").

MANSELL *v.* MANSELL

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

No. 87–201. Argued January 10, 1989—Decided May 30, 1989

In direct response to *McCarty* v. *McCarty*, 453 U. S. 210, which held that federal law as it then existed completely pre-empted the application of state community property law to military retirement pay, Congress enacted the Uniformed Services Former Spouses' Protection Act (Act), 10 U. S. C. § 1408 (1982 ed. and Supp. V), which authorizes state courts to treat as community property "disposable retired or retainer pay," § 1408(c)(1), specifically defining such pay to exclude, *inter alia*, any military retirement pay waived in order for the retiree to receive veterans' disability benefits, § 1408(a)(4)(B). The Act also creates a mechanism whereby the Federal Government will make direct community property payments of up to 50% of disposable retired or retainer pay to certain former spouses who present state-court orders granting such pay. A pre-*McCarty* property settlement agreement between appellant and appellee, who were divorced in a county Superior Court in California, a community property State, provided that appellant would pay appellee 50 percent of his total military retirement pay, including that portion of such pay which he had waived in order to receive military disability benefits. After the Act's passage, the Superior Court denied appellant's request to modify the divorce decree by removing the provision requiring him to share his total retirement pay with appellee. The State Court of Appeal affirmed, rejecting appellant's contention that the Act precluded the lower court from treating as community property the military retirement pay appellant had waived to receive disability benefits. In so holding, the court relied on a State Supreme Court decision which reasoned that the Act did not limit a state court's ability to treat total military retirement pay as community property and to enforce a former spouse's rights to such pay through remedies other than direct Federal Government payments.

Held: The Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans' disability benefits. In light of § 1408(a)(4)(B)'s limiting language as to such waived pay, the Act's plain and precise language establishes that § 1408(c)(1) grants state courts the authority to treat only disposable retired pay, not total retired pay, as community property. Appellee's argument that the Act has no pre-emptive effect of its own and must be read as a garnishment statute designed solely to limit when the Federal Government will make direct payments to a former spouse, and that, accordingly, § 1408(a)(4)(B) defines "disposable retired or retainer pay" only because payments under the statutory direct payment mechanism are limited to amounts defined by that term, is flawed for two reasons. First, the argument completely ignores the fact that § 1408(c)(1) also uses the quoted phrase to limit specifically and plainly the extent to which state courts may treat military retirement pay as community property. Second, each of § 1408(c)'s other subsections imposes new substantive limits on state courts' power to divide military retirement pay, and it is unlikely that all of the section, except for § 1408(c)(1), was intended to pre-empt state law. Thus, the garnishment argument misplaces its reliance on the fact that the Act's saving clause expressly contemplates that a retiree will be liable for "other payments" in excess of those made under the direct payment mechanism, since that clause is more plausibly interpreted as serving the limited purpose of defeating any inference that the mechanism displaced state courts' authority to divide and garnish property not covered by the mechanism. Appellee's contention that giving effect to the plain and precise statutory language would thwart the Act's obvious purposes of rejecting *McCarty* and restoring to state courts their pre-*McCarty* authority is not supported by the legislative history, which, read as a whole, indicates that Congress intended both to create new benefits for former spouses and to place on state courts limits designed to protect military retirees. Pp. 587–594.

Reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, STEVENS, SCALIA, and KENNEDY, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 595.

Douglas B. Cone argued the cause for appellant. With him on the briefs was *Jim T. Elia*.

Dennis A. Cornell argued the cause and filed a brief for appellee.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried*, *Assistant Attorney General Bolton*, and *Deputy Solicitor General Merrill;* and for the Retired Officers Association et al. by *Jan Horbaly*.

June Kazuko Inuzuka, *Judith I. Avner*, and *Sally F. Goldfarb* filed a brief for the Women's Equity Action League et al. as *amici curiae* urging affirmance.

JUSTICE MARSHALL delivered the opinion of the Court.

In this appeal, we decide whether state courts, consistent with the federal Uniformed Services Former Spouses' Protection Act, 10 U. S. C. § 1408 (1982 ed. and Supp. V) (Former Spouses' Protection Act or Act), may treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans' disability benefits. We hold that they may not.

I

A

Members of the Armed Forces who serve for a specified period, generally at least 20 years, may retire with retired pay. 10 U. S. C. § 3911 *et seq.* (1982 ed. and Supp. V) (Army); § 6321 *et seq.* (1982 ed. and Supp. V) (Navy and Marine Corps); § 8911 *et seq.* (1982 ed. and Supp. V) (Air Force). The amount of retirement pay a veteran is eligible to receive is calculated according to the number of years served and the rank achieved. §§ 3926 and 3991 (Army); §§ 6325–6327 (Navy and Marine Corps); § 8929 (Air Force). Veterans who became disabled as a result of military service are eligible for disability benefits. 38 U. S. C. § 310 (wartime disability); § 331 (peacetime disability). The amount of disability benefits a veteran is eligible to receive is calculated according to the seriousness of the disability and the degree to which the veteran's ability to earn a living has been impaired. §§ 314 and 355.

In order to prevent double dipping, a military retiree may receive disability benefits only to the extent that he waives a corresponding amount of his military retirement pay. § 3105.[1] Because disability benefits are exempt from federal, state, and local taxation, § 3101(a), military retirees who waive their retirement pay in favor of disability benefits increase their after-tax income. Not surprisingly, waivers of retirement pay are common.

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[1] For example, if a military retiree is eligible for $1500 a month in retirement pay and $500 a month in disability benefits, he must waive $500 of retirement pay before he can receive any disability benefits.

California, like several other States, treats property acquired during marriage as community property. When a couple divorces, a state court divides community property equally between the spouses while each spouse retains full ownership of any separate property. See Cal. Civ. Code Ann. § 4800(a) (West 1983 and Supp. 1989). California treats military retirement payments as community property to the extent they derive from military service performed during the marriage. See, *e. g.*, *Casas* v. *Thompson*, 42 Cal. 3d 131, 139, 720 P. 2d 921, 925, cert. denied, 479 U. S. 1012 (1986).

In *McCarty* v. *McCarty*, 453 U. S. 210 (1981), we held that the federal statutes then governing military retirement pay prevented state courts from treating military retirement pay as community property. We concluded that treating such pay as community property would do clear damage to important military personnel objectives. *Id.*, at 232–235. We reasoned that Congress intended that military retirement pay reach the veteran and no one else. *Id.*, at 228. In reaching this conclusion, we relied particularly on Congress' refusal to pass legislation that would have allowed former spouses to garnish military retirement pay to satisfy property settlements. *Id.*, at 228–232. Finally, noting the distressed plight of many former spouses of military members, we observed that Congress was free to change the statutory framework. *Id.*, at 235–236.

In direct response to *McCarty*, Congress enacted the Former Spouses' Protection Act, which authorizes state courts to treat "disposable retired or retainer pay" as community property. 10 U. S. C. § 1408(c)(1).[2] "'Disposable retired or retainer pay'" is defined as "the total monthly retired or retainer pay to which a military member is entitled," minus certain deductions. § 1408(a)(4) (1982 ed. and Supp. V). Among the amounts required to be deducted from total pay are any amounts waived in order to receive disability benefits. § 1408(a)(4)(B).[3]

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[2] The language of the Act covers both community property and equitable distribution States, as does our decision today. Because this case concerns a community property State, for the sake of simplicity we refer to § 1408(c)(1) as authorizing state courts to treat "disposable retired or retainer pay" as community property.

The Act also creates a payments mechanism under which the Federal Government will make direct payments to a former spouse who presents, to the Secretary of the relevant military service, a state-court order granting her a portion of the military retiree's disposable retired or retainer pay. This direct payments mechanism is limited in two ways. § 1408(d). First, only a former spouse who was married to a military member "for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay," § 1408(d)(2), is eligible to receive direct community property payments. Second, the Federal Government will not make community property payments that exceed 50 percent of disposable retired or retainer pay. § 1408(e)(1).

B

Appellant Gerald E. Mansell and appellee Gaye M. Mansell were married for 23 years and are the parents of six children. Their marriage ended in 1979 with a divorce decree from the Merced County, California, Superior Court. At that time, Major Mansell received both Air Force retirement pay and, pursuant to a waiver of a portion of that pay, disability benefits. Mrs. Mansell and Major Mansell entered into a property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits. Civ. No. 55594 (May 29, 1979). In 1983, Major Mansell asked the Superior Court to modify the divorce decree by removing the provision that required him to share his total retirement pay with Mrs. Mansell. The Superior Court denied Major Mansell's request without opinion.

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[3] Also deducted from total military retirement pay are amounts: (a) owed by the military member to the United States; (b) required by law to be deducted from total pay, including employment taxes, and fines and forfeitures ordered by courts-martial; (c) properly deducted for federal, state, and local income taxes; (d) withheld pursuant to other provisions under the Internal Revenue Code; (e) equal to the amount of retired pay of a member retired for physical disability; and (f) deducted to create an annuity for the former spouse. 10 U. S. C. §§ 1408(a)(4)(A)–(F) (1982 ed. and Supp. V).

Major Mansell appealed to the California Court of Appeal, Fifth Appellate District, arguing that both the Former Spouses' Protection Act and the anti-attachment clause that protects a veteran's receipt of disability benefits, 38 U. S. C. § 3101(a) (1982 ed. and Supp. IV),[4] precluded the Superior Court from treating military retirement pay that had been waived to receive disability benefits as community property. Relying on the decision of the Supreme Court of California in *Casas* v. *Thompson*, *supra*, the Court of Appeal rejected that portion of Major Mansell's argument based on the Former Spouses' Protection Act. 5 Civ. No. F002872 (Jan. 30, 1987).[5] *Casas* held that after the passage of the Former Spouses' Protection Act, federal law no longer pre-empted state community property law as it applies to military retirement pay. The *Casas* court reasoned that the Act did not limit a state court's ability to treat total military retirement pay as community property and to enforce a former spouse's rights to such pay through remedies other than direct payments from the Federal Government. 42 Cal. 3d, at 143–151, 720 P. 2d, at 928–933. The Court of Appeal did not discuss the anti-attachment clause, 38 U. S. C. § 3101(a).[6] The Supreme Court of California denied Major Mansell's petition for review.

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[4] That clause provides that veterans' benefits "shall not be assignable except to the extent specifically authorized by law, and . . . shall be exempt from the claim[s] of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the [veteran]." 38 U. S. C. § 3101(a) (1982 ed. and Supp. V).

[5] In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have prevented this pre-*McCarty* property settlement from being reopened. *McCarty* v. *McCarty*, 453 U. S. 210 (1981). The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. 5 Civ. No. F002872 (Jan. 30, 1987). Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-*McCarty* settlements is a matter of state law over which we have no jurisdiction. The federal question is therefore properly before us.

We noted probable jurisdiction, 487 U. S. 1217 (1988), and now reverse.

II

Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area. See, *e. g.*, *Rose* v. *Rose*, 481 U. S. 619, 628 (1987); *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 581 (1979). Thus we have held that we will not find pre-emption absent evidence that it is "'positively required by direct enactment.'" *Hisquierdo*, *supra*, at 581 (quoting *Wetmore* v. *Markoe*, 196 U. S. 68, 77 (1904)). The instant case, however, presents one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations.

It is clear from both the language of the Former Spouses' Protection Act, see, *e. g.*, § 1408(c)(1), and its legislative history, see, *e. g.*, H. R. Conf. Rep. No. 97–749, p. 165 (1982); S. Rep. No. 97–502, pp. 1–3, 16 (1982), that Congress sought to change the legal landscape created by the *McCarty* decision.[7] Because pre-existing federal law, as construed by this Court, completely pre-empted the application of state community property law to military retirement pay, Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property. Cf. *Midlantic Nat. Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494, 501 (1986).

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[6] Because we decide that the Former Spouses' Protection Act precludes States from treating as community property retirement pay waived to receive veterans' disability benefits, we need not decide whether the anti-attachment clause, § 3101(a), independently protects such pay. See, *e. g.*, *Rose* v. *Rose*, 481 U. S. 619 (1987); *Wissner* v. *Wissner*, 338 U. S. 655 (1950).

The appellant and appellee differ sharply on the scope of Congress' modification of *McCarty*. Mrs. Mansell views the Former Spouses' Protection Act as a complete congressional rejection of *McCarty*'s holding that state law is pre-empted; she reads the Act as restoring to state courts all pre-*McCarty* authority. Major Mansell, supported by the United States, argues that the Former Spouses' Protection Act is only a partial rejection of the *McCarty* rule that federal law pre-empts state law regarding military retirement pay.[8]

Where, as here, the question is one of statutory construction, we begin with the language of the statute. See, *e. g.*, *Blum* v. *Stenson*, 465 U. S. 886, 896 (1984); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). Mrs. Mansell's argument faces a formidable obstacle in the language of the Former Spouses' Protection Act. Section 1408(c)(1) of the Act affirmatively grants state courts the power to divide military retirement pay, yet its language is both precise and limited. It provides that "a court may treat disposable retired or retainer pay . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." § 1408(c)(1). The Act's definitional section specifically defines the term "disposable retired or retainer pay" to exclude, *inter alia*, military retirement pay waived in order to receive veterans' disability payments. § 1408(a)(4)(B).[9] Thus, under the Act's plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay as community property.

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[7] Congress also demonstrated its focus on *McCarty* when it chose June 25, 1981, the day before *McCarty* was decided, as the applicable date for some of the Act's provisions. 10 U. S. C. § 1408(c)(1); see also note following § 1408, Pub. L. 97-252, § 1006(b) (transition provisions).

[8] Although the United States has filed an *amicus* brief supporting Major Mansell, its initial *amicus* brief, filed before the Court noted jurisdiction, supported Mrs. Mansell.

Mrs. Mansell attempts to overcome the limiting language contained in the definition, § 1408(a)(4)(B), by reading the Act as a garnishment statute designed solely to set out the circumstances under which, pursuant to a court order, the Federal Government will make direct payments to a former spouse. According to this view, § 1408(a)(4)(B) defines "[d]isposable retired or retainer pay" only because payments under the federal direct payments mechanism are limited to amounts defined by that term.

The garnishment argument relies heavily on the Act's saving clause. That clause provides:

> "Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, *or other payments* required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under [the direct payments mechanism]. Any such unsatisfied obligation

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[9] The statute provides in pertinent part:

"'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled . . . less amounts which—

. . . . .

"(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martials, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38 [disability payments]." § 1408(a)(4)(B).

> of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under . . . [the direct payments mechanism] has been paid." § 1408(e)(6) (emphasis added).

Mrs. Mansell argues that, because the saving clause expressly contemplates "other payments" in excess of those made under the direct payments mechanism, the Act does not "attempt to tell the state courts what they may or may not do with the underlying property." Brief for Appellee 17. For the reasons discussed below, we find a different interpretation more plausible. In our view, the saving clause serves the limited purpose of defeating any inference that the federal direct payments mechanism displaced the authority of state courts to divide and garnish property not covered by the mechanism. Cf. *Hisquierdo*, 439 U. S., at 584 (to prohibit garnishment is to prohibit division of property); *Wissner* v. *Wissner*, 338 U. S. 655 (1950) (same).

First, the most serious flaw in the garnishment argument is that it completely ignores § 1408(c)(1). Mrs. Mansell provides no explanation for the fact that the defined term—"disposable retired or retainer pay"—is used in § 1408(c)(1) to limit specifically and plainly the extent to which state courts may treat military retirement pay as community property.

Second, the view that the Act is solely a garnishment statute and therefore not intended to pre-empt the authority of state courts is contradicted not only by § 1408(c)(1), but also by the other subsections of § 1408(c). Sections 1408(c)(2), (c)(3), and (c)(4) impose new substantive limits on state courts' power to divide military retirement pay. Section 1408(c)(2) prevents a former spouse from transferring, selling, or otherwise disposing of her community interest in the military retirement pay.[10] Section 1408(c)(3) provides that a state court cannot order a military member to retire so that the former spouse can immediately begin receiving her portion of military retirement pay.[11] And § 1408(c)(4) prevents spouses from forum shopping for a State with favorable divorce laws.[12] Because each of these provisions pre-empts state law, the argument that the Act has no pre-emptive effect of its own must fail.[13] Significantly, Congress placed each of these substantive restrictions on state courts in the same section of the Act as § 1408(c)(1). We think it unlikely that every subsection of § 1408(c), except § 1408(c)(1), was intended to pre-empt state law.

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[10] The Senate Report expressly contemplates that § 1408(c)(2) will pre-empt state law. S. Rep. No. 97-502, p. 16 (1982).

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[11] There was some concern expressed at the Senate hearings on the Act that state courts could direct a military member to retire. See, *e. g.*, Hearings before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services, 97th Cong., 2d Sess., 132–133 (1982) (Sen. Exon); *id.*, at 70–71 (veterans' group); *id.*, at 184 (Air Force). Thus the Senate version of the bill contained § 1408(c)(3) in order to ensure that state courts did not have such power, S. Rep. No. 97–502, *supra*, at 17, and at conference the House agreed to add the provision. H. R. Conf. Rep. No. 97–749, p. 167 (1982).

[12] A state court may not treat disposable retirement pay as community property unless it has jurisdiction over the military member by reason of (1) residence, other than by military assignment in the territorial jurisdiction of the court, (2) domicile, or (3) consent. § 1408(c)(4). Although the Senate Committee had decided not to include any forum shopping restrictions, seeing "no need to limit the jurisdiction of the State courts by restricting the benefits afforded by this bill . . . ," S. Rep. No. 97–502, *supra*, at 9, the House version of the bill contained the restrictions, and at conference, the Senate agreed to add them. H. R. Conf. Rep. No. 97–749, *supra*, at 167.

[13] That Congress intended the substantive limits in § 1408(c)(1) to be, to some extent, distinct from the limits on the direct payments mechanism contained in § 1408(d) is demonstrated by the legislative compromise that resulted in the direct payments mechanism being available only to former spouses who had been married to the military retiree for 10 years or more. § 1408(d)(2). Under the House version of the bill, military retirement pay could be treated as community property only if the couple had been married for 10 years or more. H. R. Conf. Rep. No. 97–749, *supra*, at 165. The Senate Committee had considered, but rejected, such a provision. S. Rep. No. 97–502, *supra*, at 9–11. The conferees agreed to remove the House restriction. Instead, they limited the federal direct payments mechanism to marriages that had lasted 10 years or more. H. R. Conf. Rep. No. 97–749, *supra*, at 166–167. Under this compromise, state courts have been granted the authority to award a portion of disposable military retired pay to former spouses who were married to the mili-

In the face of such plain and precise statutory language, Mrs. Mansell faces a daunting standard. She cannot prevail without clear evidence that reading the language literally would thwart the obvious purposes of the Act. See, *e. g.*, *Trans Alaska Pipeline Rate Cases*, 436 U. S. 631, 643 (1978). The legislative history does not indicate the reason for Congress' decision to shelter from community property law that portion of military retirement pay waived to receive veterans' disability payments.[14] But the absence of legislative history on this decision is immaterial in light of the plain and precise language of the statute; Congress is not required to build a record in the legislative history to defend its policy choices.

Because of the absence of evidence of specific intent in the legislative history, Mrs. Mansell resorts to arguments about the broad purposes of the Act. But this reliance is misplaced because, at this general level, there are statements that both contradict and support her arguments. Her argument that the Act contemplates no federal pre-emption is supported by statements in the Senate Report and the House Conference

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tary member for less than 10 years, but such former spouses may not take advantage of the direct payments mechanism.

[14] The only reference to the definitional section is contained in the Senate Report which states that the deductions from total retired pay, including retirement pay waived in favor of veterans' disability payments, "generally parallel those existing deductions which may be made from the pay of Federal employees and military personnel before such pay is subject to garnishment for alimony or child support payments under section 459 of the Social Security Act. (42 U. S. C. 659)." S. Rep. No. 97–502, *supra*, at 14. This statement, however, describes the defined term in § 1408(a)(4). It is not helpful in determining why Congress chose to use the defined term—"disposable retired or retainer pay"—to limit state-court authority in § 1408(c)(1).

Report that the purpose of the Act is to overcome the *McCarty* decision and to restore power to the States.[15] But the Senate Report and the House Conference Report also contain statements indicating that Congress rejected the uncomplicated option of removing all federal pre-emption and returning unlimited authority to the States.[16] Indeed, a bill that would have eliminated all federal pre-emption died in the Senate Committee.[17] Her argument that Congress primarily intended to protect former spouses is supported by evidence that Members of Congress were moved by, and responding to, the distressed economic plight of military wives after a divorce.[18] But the Senate Report and the House debates contain statements which reveal that Congress was concerned as well with protecting the interests of military members.[19]

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[15] See, *e. g.*, S. Rep. No. 97–502, *supra*, at 1 ("The primary purpose of the bill is to remove the effect of the United States Supreme Court decision in *McCarty* v. *McCarty*, 453 U. S. 210 (1981). The bill would accomplish this objective by permitting Federal, State, and certain other courts, consistent with the appropriate laws, to once again consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, annulment or legal separation"). See also *id.*, at 5 and 16; H. R. Conf. Rep. No. 97–749, *supra*, at 165.

[16] H. R. Conf. Rep. No. 97–749, *supra*, at 165 ("The House amendment would permit disposable military retired pay to be considered as property in divorce settlements *under certain specified conditions*") (emphasis added); *ibid.* ("The House Amendment contained several provisions that would place restrictions on the division of retired pay"); S. Rep. No. 97–502, *supra*, at 4 ("[Senate] 1814 imposes *three distinct limits* on the division or enforcement of court orders against military retired pay in divorce cases") (emphasis added).

[17] Entitled "Nonpreemption of State law" the bill provided that "[f]or purposes of division of marital property of any member or former member of the armed forces upon dissolution of such member's marriage, the law of the State in which the dissolution of marriage proceeding was instituted shall be dispositive on all matters pertaining to the division of any retired, retirement, or retainer pay to which such member or former member is entitled or will become entitled." S. 1453, 97th Cong., 1st Sess. (1981).

[18] The Senate Committee pointed out that "frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career affording economic security, job skills and pension protection." S. Rep. No. 97–502, *supra*, at 6. The language of the Act, and much of its legislative history, is written

Thus, the legislative history, read as a whole, indicates that Congress intended both to create new benefits for former spouses and to place limits on state courts designed to protect military retirees. Our task is to interpret the statute as best we can, not to second-guess the wisdom of the congressional policy choice. See, *e. g.*, *Rodriguez* v. *United States*, 480 U. S. 522, 526 (1987) *(per curiam)* ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice"). Given Congress' mixed purposes, the legislative history does not clearly support Mrs. Mansell's view that giving effect to the plain and precise language of the statute would thwart the obvious purposes of the Act.

We realize that reading the statute literally may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.

III

For the reasons stated above, we hold that the Former Spouses' Protection Act does not grant state courts the

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in gender neutral terms, and there is no doubt that the Act applies equally to both former husbands and former wives. But "it is quite evident from the legislative history that Congress acted largely in response to the plight of the military *wife*." Horkovich, Uniformed Services Former Spouses' Protection Act: Congress' Answer to *McCarty* v. *McCarty* Goes Beyond the Fundamental Question, 23 Air Force L. Rev. 287, 308 (1982–1983) (emphasis in original).

[19] See, *e. g.*, S. Rep. No. 97–502, *supra*, at 7 ("All agreed that some form of remedial legislation which is fair and equitable to both spouses was necessary to provide a solution to the *McCarty* decision"); see also *id.*, at 11; nn. 10, 11, 12, and 16, *supra*.

power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits. The judgment of the California Court of Appeal is hereby reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN joins, dissenting.

Today the Court holds that the federal Uniformed Services Former Spouses' Protection Act (Former Spouses' Protection Act or Act) denies state courts the power to order in a divorce decree the division of military retirement pay unilaterally waived by a retiree in order to receive veterans' disability benefits. The harsh reality of this holding is that former spouses like Gaye Mansell can, without their consent, be denied a fair share of their ex-spouse's military retirement pay simply because he elects to increase his after-tax income by converting a portion of that pay into disability benefits. On the Court's reading of the Former Spouses' *Protection* Act, Gaye Mansell will lose nearly 30 percent of the monthly retirement income she would otherwise have received as community property. I view the Court's holding as inconsistent with both the language and the purposes of the Act, and I respectfully dissent.

The Court recognized in *McCarty* v. *McCarty*, 453 U. S. 210, 235 (1981), that "the plight of an ex-spouse of a retired service member is often a serious one." In holding that federal law precluded state courts from dividing *nondisability* military retired pay pursuant to state community property laws, *McCarty* concluded with an invitation to Congress to reexamine the issue. Congress promptly did so and enacted the Former Spouses' Protection Act. Today, despite overwhelming evidence that Congress intended to overrule *McCarty* completely, to alter pre-existing federal military retirement law so as to eliminate the pre-emptive effect discovered in *McCarty*, and to restore to the States authority to issue divorce decrees affecting military retirement pay consistent with state law, the Court assumes that Congress only partially rejected *McCarty* and that the States can apply their community property laws to military retirement pay only to the extent that the Former Spouses' Protection Act affirmatively grants them authority to do so. *Ante*, at 588. The *McCarty* decision, however, did not address retirement pay waived to receive disability benefits; nor did it identify any explicit statutory provision precluding the States from characterizing such waived retirement pay as community property. Thus, I reject the Court's central premise that the States are precluded by *McCarty* from characterizing as community property any retirement pay waived to receive disability benefits absent an affirmative grant of authority in the Former Spouses' Protection Act.

In my view, Congress intended, by enacting the Former Spouses' Protection Act, to eliminate the effect of *McCarty*'s pre-emption holding altogether and to return to the States their authority "to treat military pensions in the same manner as they treat other retirement benefits." S. Rep. No. 97–502, p. 10 (1982). See also *id.*, at 1 ("The primary purpose of the bill is to remove the effect of the United States Supreme Court decision in *McCarty* v. *McCarty*, 453 U. S. 210 (1981). The bill would accomplish this objective by permitting Federal, State, and certain other courts, consistent with the appropriate laws, to once again consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, annulment or legal separation"); *id.*, at 5 ("[T]he committee intends the legislation to restore the law to what it was when the courts were permitted to apply State divorce laws to military retired pay"); *id.*, at 16 ("The provision is intended to remove the federal preemption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divis[i]ble"); 128 Cong. Rec. 18314 (1982) ("The amendment simply returns to State courts the authority to treat military retired pay as it does other public and private pensions") (remarks of Rep. Schroeder, bill sponsor).

Family law is an area traditionally of state concern, *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 581 (1979), and we have not found federal pre-emption of state authority in this area absent a determination that "Congress has 'positively required by direct enactment' that state law be pre-empted." *Ibid.* (quoting *Wetmore* v. *Markoe*, 196 U. S. 68, 77 (1904)). The Former Spouses' Protection Act does not "positively require" States to abandon their own law concerning the divisibility upon divorce of military retirement pay waived in order to obtain veterans' disability benefits. On the contrary, the whole thrust of the Act was to restore to the States their traditional authority in the area of domestic relations. Even beyond that restoration, Congress sought to provide greater federal assistance and protection to military spouses than existed before *McCarty* by creating a federal garnishment remedy in aid of state court community property awards. That, in fact, is the central purpose and preoccupation of the Act's complex statutory framework. The Former Spouses' Protection Act is primarily a remedial statute creating a mechanism whereby former spouses armed with state court orders may enlist the Federal Government to assist them in obtaining some of their property entitlements upon divorce. The federal garnishment remedy created by the Act is limited, but it serves as assistance and not, as the Court would have it, a hindrance to former spouses. Thus, the provision at 10 U. S. C. § 1408(a)(4)(B) (1982 ed. and Supp. V) of the Act defining "[d]isposable retired or retainer pay" to exclude "amounts waived in order to receive compensation under title 5 or title 38," and its incorporation into § 1408(c)(1)'s community property provision, only limits the federal garnishment remedy created by the Act. It does not limit the authority of States to characterize such waived retirement pay as community property under state law.

This reading is reinforced by the legislative history, which indicates that "[t]he specific deductions that are to be made from the total monthly retired and retainer pay generally parallel those existing deductions which may be made from the pay of Federal employees and military personnel before such pay is subject to *garnishment* for alimony or child support payments under section 459 of the Social Security Act (42 U. S. C. 659)." S. Rep. No. 97–502, *supra*, at 14 (emphasis added). The Court finds that this statement "is not helpful in determining why Congress chose to use the defined term—'disposable retired or retainer pay'—to limit state-court authority in § 1408(c)(1)." *Ante*, at 592, n. 14. True, it is singularly unhelpful in supporting the Court's view that § 1408(c)(1) denies state courts authority to *characterize* retirement pay waived in lieu of disability benefits as community property. By contrast, it *is* helpful in determining why Congress chose to use "disposable retired or retainer pay" as the term limiting state court authority to *garnish* military retirement pay. In light of the fact that disability benefits are exempt from garnishment in most cases, 38 U. S. C. § 3101(a) (1982 ed., Supp. V), had Congress not excluded "amounts waived" in order to receive veterans' disability benefits from the federal garnishment remedy created by the Former Spouses' Protection Act it would have eviscerated the force of the anti-attachment provisions of § 3101(a).

To take advantage of the federal garnishment remedy, which provides for direct payment by the Government to former spouses in specified circumstances, former spouses must serve on the appropriate service Secretary court orders meeting certain requirements. In the case of a division of property, the court order must "specifically provid[e] for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member." 10 U. S. C. § 1408(a)

(2)(C) (1982 ed., Supp. V). It must contain certain information and be regular on its face. §§ 1408(b)(1)(B), 1408(b)(1)(C), 1408(b)(1)(D), 1408(b)(2) (1982 ed. and Supp. V). The Act sets forth the procedures to be followed by the Secretary in making payments directly to former spouses. § 1408(d) (1982 ed. and Supp. V). Finally, the Act places limits on the total amount of disposable retirement pay that may be paid by the Secretary to former spouses, §§ 1408(e)(1), 1408(e)(4)(B) (1982 ed. and Supp. V), and it clarifies the procedures to be followed in the event of multiple or conflicting court orders. §§ 1408(e)(2), 1408(e)(3)(A) (1982 ed., Supp. V).

Subsection 1408(c)(1) authorizes the application of this federal garnishment remedy to community property awards by providing that "a court *may* treat disposable retired or retainer pay payable to a member . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." (Emphasis added.) This provision should not be read to *preclude* States from characterizing retirement pay waived to receive disability benefits as community property but only to preclude the use of the federal direct payments mechanism to attach that waived pay. Nor do §§ 1408 (c)(2), (c)(3), and (c)(4) compel the conclusion that Congress intended to preempt States from characterizing gross military retirement pay as community property divisible upon divorce. Those three provisions indicate what States may "not" do. That Congress explicitly restricted the authority of courts in certain specific respects, however, does not support the inference that § 1408(c)(1)—an affirmative *grant* of power—should be interpreted as precluding everything it does not grant. On the contrary, it supports the inference that Congress explicitly and directly precluded those matters it wished to preempt entirely, leaving the balance of responsibility in the area of domestic relations to the States. In this respect, the Court mischaracterizes Gaye Mansell's argument as insisting that "the Act contemplates no federal pre-emption. . . ."

Ante, at 592. Subsection 1408(c) has substantive effects on the power of state courts—its first paragraph expands those powers ("a court may treat"); its remaining paragraphs restrict those powers ("this section does not create"; "[t]his section does not authorize"; "[a] court may not treat").

That States remain free to characterize waived portions of retirement pay as community property is unambiguously underscored by the broad language of the saving clause contained in the Act, § 1408(e)(6). That clause provides:

> "*Nothing* in this section shall be construed to relieve a member of liability for the payment of alimony, child support, *or other payments* required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). *Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section* in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U. S. C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid." (Emphasis added.)

The Court explains that the saving clause "serves the limited purpose of defeating any inference that the federal direct payments mechanism displaced the authority of state courts to divide and garnish property *not* covered by the mechanism." *Ante*, at 590 (emphasis added). I agree. What I do not understand is how the Court can read the Act's saving clause in this manner and yet conclude, without contradiction, that California may not characterize retirement pay waived for disability benefits as community property. All California seeks to do is "divide and garnish property not covered by the [federal direct payments] mechanism." *Ibid.* Specifically, California wishes to exercise its traditional family law powers to divide as community property that portion of Major Mansell's retirement pay which he unilaterally converted into disability benefits, and use state-law garnishment remedies to attach the *value* of Gaye Mansell's portion of this community property. That is precisely what § 1408(e)(6) saves to the States by "defeating" any contrary inference, *ante*, at 590, that the Act has displaced the State's authority to enforce its divorce decrees "by any means available under law other than the means provided under this section. . . ." § 1408(e)(6). As the California Supreme Court so aptly put it, in the saving clause Congress emphasized that "the limitations on the service secretary's ability to reach the retiree's gross pay [are] not to be deemed a limitation on the state court's ability to define the community property interests at the time of dissolution." *Casas* v. *Thompson*, 42 Cal. 3d 131, 150, 720 P. 2d 921, 933, cert. denied, 479 U. S. 1012 (1986). In other words, while a former spouse may not receive community property payments that exceed 50 percent of a retiree's disposable retirement pay through the direct federal garnishment mechanism, § 1408(e)(1), a state court is free to characterize gross retirement pay as community property depending on the law of its jurisdiction, and former spouses may pursue any other remedy "available under law" to satisfy that interest. "Nothing" in the Former Spouses' Protection Act relieves military retirees of liability under such law if they possess other assets equal to the value of the former spouse's share of the gross retirement pay.

Under the Court's reading of the Act as precluding the States from characterizing gross retirement pay as community property, a military retiree has the power unilaterally to convert community property into separate property and increase his after-tax income, at the expense of his ex-spouse's financial security and property entitlements. To read the statute as permitting a military retiree to pocket 30 percent, 50 percent, even 80 percent of gross retirement pay by converting it into disability benefits and thereby to avoid his obligations under state community property law, however, is to distort beyond recognition and to thwart the main purpose of the statute, which is to recognize the sacrifices made by military spouses and to protect their economic security in the face of a divorce. Women generally suffer a decline in their standard of living following a divorce. See Weitzman, The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards, 28 UCLA L. Rev. 1181, 1251 (1981). Military wives face special difficulties because "frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career affording economic security, job skills and pension protection." S. Rep. No. 97–502, at 6. The average military couple married for 20 years moves about 12 times, and military wives experience an unemployment rate more than double that of their civilian counterparts. Brief for Women's Equity Action League et al. as *Amici Curiae* 10–11. Retirement pay, moreover, is often the single most valuable asset acquired by military couples. *Id.*, at 18. Indeed, the one clear theme that emerges from the legislative history of the Act is that Congress recognized the dire plight of many military wives after divorce and sought to protect their access to their ex-husbands' military retirement pay. See S. Rep. No. 97–502, at 6; 128 Cong. Rec. 18318 (1982) ("[F]requent military moves often preclude spouses from pursuing their own careers and establishing economic independence. As a result, military spouses are frequently unable to vest in their own retirement plans or obtain health insurance coverage from a private employer. Military spouses who become divorced often lose all access to retirement and health benefits—despite a 'career' devoted to the military") (remarks of Rep. Schumer). See also *id.*, at 18315, 18316, 18317, 18320, 18323, 18328. Reading the Act as not precluding States from characterizing retirement pay waived to receive disability benefits as property divisible upon divorce is faithful to the clear remedial purposes of the statute in a way that the Court's interpretation is not.

The conclusion that States may treat gross military retirement pay as property divisible upon divorce is not inconsistent with 38 U. S. C. § 3101(a) (1982 ed., Supp. V). This anti-attachment provision provides that veterans' disability benefits "shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." Gaye Mansell acknowledges, as she must, that § 3101(a) precludes her from garnishing under state law Major Mansell's veterans' disability benefits in satisfaction of her claim to a share of his gross military retirement pay, just as § 1408(c)(1) precludes her from invoking the federal direct payments mechanism in satisfaction of that claim. To recognize that § 3101(a) protects the funds from a specific source, however, does not mean that § 3101(a) prevents Gaye Mansell from recovering her 50 percent interest in Major Mansell's gross retirement pay out of any income or assets he may have *other* than his veterans' disability benefits. So long as those benefits themselves are protected, calculation of Gaye Mansell's entitlement on the basis of Major Mansell's gross retirement pay does not constitute an "attachment" of his veterans' disability benefits. Section 3101(a) is designed to ensure that the needs of disabled veterans and their families are met, see *Rose* v. *Rose*, 481 U. S. 619, 634 (1987), without interference from creditors. That purpose is fulfilled so long as the benefits themselves are protected by the anti-attachment provision.

In sum, under the Court's interpretation of the Former Spouses' Protection Act, the former spouses Congress sought to protect risk having their economic security severely undermined by a unilateral decision of their ex-spouses to waive retirement pay in lieu of disability benefits. It is inconceivable that Congress intended the broad remedial purposes of the statute to be thwarted in such a way. To be sure, as the Court notes, Congress sought to be "fair and equitable" to retired service members as well as to protect divorced spouses. *Ante*, at 593–594, and n. 19. Congress explicitly protected military members by limiting the percentage of disposable retirement pay subject to the federal garnishment remedy and by expressly providing that military members could not be forced to retire. See 10 U. S. C. §§ 1408(e)(1), 1408(e)(4)(B), 1408(c)(3). Moreover, a retiree is still advantaged by waiving retirement pay in lieu of disability benefits: the pay that is waived is not subject to the federal direct payments mechanism, and the former spouse must resort instead to the more cumbersome and costly process of seeking a state garnishment order against the value of that waived pay. See H. R. Rep. No. 98–700, pp. 4–5 (1984) (discussing difficulties faced by ex-spouses in obtaining state garnishment orders). Even these state processes cannot directly attach the military retiree's disability benefits for purposes of satisfying a community property division given the strictures of the anti-attachment provision of 38 U. S. C. § 3101(a). There is no basis for concluding, however, that Congress sought to protect the interests of service members by allowing them unilaterally to deny their former spouses *any* opportunity to obtain a fair share of the couple's military retirement pay.

It is now once again up to Congress to address the inequity created by the Court in situations such as this one. But because I believe that Congress has already expressed its intention that the States have the authority to characterize waived retirement pay as property divisible upon divorce, I dissent.

ASARCO INC. ET AL. *v.* KADISH ET AL.

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 87-1661. Argued February 27, 1989—Decided May 30, 1989

Among other things, the New Mexico-Arizona Enabling Act of 1910 granted Arizona certain lands, excluding mineral lands, in trust for the support of public schools, and, in § 28, provided that granted lands cannot be sold or leased except upon compliance with certain conditions regarding advertising, bidding, and appraisal. Arizona incorporated these conditions into Article 10 of its Constitution. After this Court held the original mineral land exclusion inapplicable to lands not known to be mineral at the time of the grant, *Wyoming* v. *United States*, 255 U. S. 489, Congress passed the Jones Act in 1927, extending the terms of the original grant to encompass all mineral lands. The Enabling Act was also amended in 1936 and 1951 to clarify the procedures for leasing granted lands for specific purposes. The latter amendment expressly extinguished the § 28 restrictions on leases of granted lands for the development of hydrocarbon substances. Arizona's own law governing mineral leases on state lands does not require that the lands be advertised, appraised, or leased for their full appraised value. Ariz. Rev. Stat. Ann. § 27-234(B). Respondents, individual taxpayers and a state teachers association, brought a state-court suit against the State Land Department and others, seeking a declaration that § 27-234(B) is void on the ground that it does not comply with the provisions of § 28 or § 10 of the Arizona Constitution and requesting appropriate injunctive relief. Petitioners, mineral lessees of state school lands, intervened as defendants. The trial court upheld the statute. The State Supreme Court reversed, ruling that § 27-234(B) is "unconstitutional and invalid as it pertains to nonhydrocarbon mineral leases," and remanded the case for the trial court, *inter alia*, to enter a judgment declaring § 27-234(B) invalid and to consider what further relief might be appropriate.

Held: The judgment is affirmed.

155 Ariz. 484, 747 P. 2d 1183, affirmed.

JUSTICE KENNEDY delivered the opinion of the Court with respect to Parts I, II-A, II-B-2, II-C, III, and IV, concluding that:

1. This Court has jurisdiction to review the decision below. Pp. 610-612, 617-633.

(a) The Arizona Supreme Court issued a final judgment within the meaning of 28 U. S. C. § 1257, despite the fact that it remanded the case for the trial court to determine appropriate further relief. On remand, the trial court does not have before it any federal question whether past or current leases are valid, since respondents, on appeal, withdrew their request for an accounting and payment of sums due under past leases. In addition, the trial court's further actions cannot affect the State Supreme Court's ruling that § 27–234(B) is invalid. Thus, the judgment below comes within two of the exceptions to the finality requirement set out in *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 479, 480: (1) the federal issue is conclusive and the outcome of further proceedings is preordained, and (2) the federal questions that could come to this Court have been adjudicated by the state court, and the remaining issues will not give rise to any further federal question. Pp. 611–612.

(b) When a state court has issued a judgment interpreting federal law in a case in which the plaintiffs in the original action lacked standing to sue under the principles governing the federal courts, this Court may exercise its jurisdiction on certiorari if the state-court judgment causes direct, specific, and concrete injury to the parties who petition for this Court's review, as long as the requisites of an Article III case or controversy are also met. Here, petitioners possess standing to invoke federal-court authority, since they have alleged that the decision below poses a serious and immediate threat to their leases' continuing validity, that such injury can be traced to the state court's erroneous interpretation of federal statutes, and that the injury can be redressed by a favorable decision in this Court. Moreover, the requisites of a case or controversy are met, since the parties remain adverse, and the judgment below altered tangible legal rights. It would be inappropriate for this Court to vacate the judgment below on the ground that respondents lacked federal standing when they brought suit initially, and to remand for appropriate proceedings, since such a course would render nugatory the state proceedings and have the effect of imposing federal standing requirements on the state courts whenever they adjudicate federal law issues, whereas established traditions and this Court's decisions recognize that state courts are not bound by Article III and yet have it within both their power and proper role to render binding judgments on federal-law issues, subject only to review by this Court. It would also be inappropriate for this Court simply to order dismissal, leaving petitioners free to bring a declaratory judgment action in federal court raising the same claims, since such a disposition would be likely to defeat the normal preclusive effects of the state court's judgment on the ground that that court's conclusions about federal law were not subject to any federal review. Such a course would also represent an unnecessary partial inroad on the *Rooker-Feldman* doctrine's construction of § 1257 as barring direct review in lower federal courts of a decision reached by the highest state court, *District of Columbia Court of Appeals* v. *Feldman*, 460

U. S. 462; *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, particularly since petitioners have already presented this Court with a case or controversy justiciable under federal standards. Pp. 617–624.

(c) The decision below is not based on an adequate and independent state ground that would defeat review of the federal issue by this Court. Although the state court's opinion mentioned the State Constitution several times and directed the trial court to declare § 27–234(B) "unconstitutional," its discussion focused solely on the federal statutes without ever mentioning the State Constitution apart from the Enabling Act. Moreover, the state court explicitly considered itself bound by this Court's decisions to adopt the plaintiffs' construction, and described Article 10 of the State Constitution as simply a "rescript" of § 28 of the Enabling Act. Thus, the opinion's references to the State Constitution merely reflect a holding which rests on the state court's interpretation of federal law, and do not divorce the state constitutional issue from the federal-law questions. Pp. 624–625.

2. Section 27–234(B) is invalid as to nonhydrocarbon mineral leases, since the sale or lease of mineral lands granted to Arizona under the federal statutes must substantially conform to the mandatory requirements set out in the Enabling Act. Pp. 625–633.

(a) The grant of all lands under the Enabling Act is conditioned, by the statute's clear and express language, upon the specific requirements for leasing or selling those lands. Petitioners' reliance on *Neel* v. *Barker*, 27 N. M. 605, 204 P. 205, for the proposition that since mineral lands were originally exempt from the 1910 grant, the Enabling Act's provisions do not apply to lands later determined to be mineral in nature, is flawed in two respects. First, *Neel* did not take into account this Court's decision in *Wyoming* v. *United States*, *supra*, that unknown mineral lands were within the grant. Second, since those lands were within the 1910 grant, they could not be regarded as unburdened by its mandatory conditions. Pp. 627–628.

(b) The lands granted under the Jones Act are also subject to the Enabling Act conditions. To read that Act's § 1(a) language—which declares that the grant of mineral lands thereunder "shall be of the same effect as prior grants" of nonmineral lands—as only assuring that title to the lands passed and vested in the same manner and with the same validity as titles under the Enabling Act would render the language redundant, since the statute subsequently directly addresses the vesting of titles. Instead, that language achieved Congress' objective of extending the 1910 grant to mineral lands and confirming their title to the States. Similarly, § 1(b)—which states that though mineral *lands* may be sold, the rights to mine and remove the minerals themselves may only be leased "as the State legislature may direct"—is not blanket authority for

States to lease minerals on whatever terms they wish as long as the leases' proceeds go to the schools. Rather, it authorizes the States to regulate the methods by which mineral leases are made and to specify necessary or desirable additional terms, as long as the leases comply with the Enabling Act's dispositional requirements. Pp. 628–631.

(c) The 1936 and 1951 amendments to the Enabling Act confirm that Congress never removed the original conditions contained in the Act. In the amendments, Congress reiterated the formulation that lands could be leased for certain purposes as the state legislature "may direct" and as it "may prescribe." The 1936 amendment did not alter the application of § 28 to "all lands," and the 1951 amendment, because it *expressly* extinguished the § 28 restrictions as to hydrocarbon leases, but not as to other mineral leases, tends to confirm that the original restrictions remain in force as to nonhydrocarbon leases. Pp. 631–633.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE SCALIA, concluded in Part II–B–1 that the suit would have been dismissed at the outset if federal standing-to-sue rules were to apply, since neither respondent taxpayers nor respondent teachers association, the original plaintiffs, would have satisfied the requirements for bringing suit in federal court. Respondent taxpayers' assertion that § 27–234(B) has "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes," and respondent association's allegations that the section "imposes an adverse economic impact" on its members and that teachers have a special interest in the quality of education in the State, do not assert the kind of particular, direct, and concrete personal injury that is necessary to confer standing to sue in federal courts. Pp. 612–617.

JUSTICE BRENNAN, joined by JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN, agreeing that the question whether the state-court plaintiffs had Article III standing is irrelevant when it is the defendants below who invoke the federal courts' authority, concluded that it was unnecessary to reach the question of the standing of the plaintiffs below. Pp. 633–634.

KENNEDY, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Part I, in which all participating Members joined, the opinion of the Court with respect to Parts II–A, II–B–2, II–C, III, and IV, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, and an opinion with respect to Part II–B–1, in which REHNQUIST, C. J., and STEVENS and SCALIA, JJ., joined. BRENNAN, J., filed an opinion concurring in part and concurring in the judgment, in which WHITE, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 633. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined, *post*, p. 634. O'CONNOR, J., took no part in the consideration or decision of the case.

Daniel M. Gribbon argued the cause for petitioners. With him on the briefs were *William H. Allen, Elizabeth V. Foote, Burton M. Apker,* and *Howard A. Twitty.*

David S. Baron argued the cause for respondents. With him on the brief was *Kevin J. Lanigan.*

Christopher J. Wright argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Fried, Assistant Attorney General Marzulla, Deputy Solicitor General Wallace, Robert L. Klarquist,* and *J. Carol Williams.**

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part II–B–1.

The ultimate question for our decision is whether Arizona's statute governing mineral leases on state lands is void because it does not conform with the federal laws that originally granted those lands from the United States to Arizona. First, however, there is a difficult question about our own jurisdiction, a matter which touches on essential aspects of the proper relation between state and federal courts.

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*Briefs of *amici curiae* urging reversal were filed for Clinton Campbell Contractor, Inc., d/b/a Phoenix Brick Yard, by *Calvin H. Udall* and *Nancy L. Rowen;* and for the Alaska Miners Association et al. by *Ronald A. Zumbrun* and *Robin L. Rivett.*

A brief of *amici curiae* was filed for the State of California et al. by *John K. Van de Kamp,* Attorney General of California, *Jan S. Stevens,* Supervising Deputy Attorney General, and *Mary L. Holt,* Deputy Attorney General, joined by the Attorneys General for their respective States as follows: *Jim Jones* of Idaho, *Marc Racicot* of Montana, *Hubert H. Humphrey III* of Minnesota, *Hal Stratton* of New Mexico, *Nicholas J. Spaeth* of North Dakota, *Robert Henry* of Oklahoma, *Roger A. Tellinghuisen* of South Dakota, *R. Paul Van Dam* of Utah, *Kenneth O. Eikenberry* of Washington, and *Joseph B. Meyer* of Wyoming.

I

Various individual taxpayers and the Arizona Education Association, which represents approximately 20,000 public schoolteachers throughout the State, brought suit in Arizona state court, seeking a declaration that the state statute governing mineral leases on state lands, Ariz. Rev. Stat. Ann. §27–234(B) (Supp. 1988), is void, and also seeking appropriate injunctive relief. The state statute was challenged on the ground that it does not comply with the methods Congress required the State to follow before it could lease or sell the lands granted from the United States in the New Mexico-Arizona Enabling Act of 1910, 36 Stat. 557, and which are repeated in the Arizona Constitution. The suit was brought against the Arizona Land Department and others. ASARCO Incorporated and other current mineral lessees of state school lands were permitted to intervene as defendants. Eventually the trial court certified the case as a defendant class action under Arizona Rule of Civil Procedure 23. The defendant class consisted of all present and future mineral lessees of state lands.

The trial court upheld the statute on cross-motions for summary judgment, and respondents (the original plaintiffs) appealed. The Arizona Supreme Court reversed over the dissent of one justice, ruling that the statute is "unconstitutional and invalid as it pertains to nonhydrocarbon mineral leases." *Kadish* v. *Arizona State Land Dept.*, 155 Ariz. 484, 498, 747 P. 2d 1183, 1197 (1987). It remanded the case to the trial court with instructions to enter summary judgment for respondents, to enter a judgment declaring §27–234(B) invalid, and to consider what further relief, if any, might be appropriate.

Various of the mineral lessees filed a petition for certiorari, and we granted review. 488 U. S. 887 (1988).

II

Before we may undertake to consider whether the state legislation authorizing the leases is valid under federal law, we must rule on whether we have jurisdiction in the case. The parties and *amici* raise three jurisdictional issues, each of substance. We would be required, of course, to raise these matters on our own initiative if necessary, for our legitimate exercise of judicial power is confined both by statutes and by Article III of the Constitution. The issues here are: first, whether the judgment below is final; second, whether there is standing and an actual case or controversy that permits of a decision in federal court; and third, whether the decision below is unreviewable in this Court because it rests on an adequate and independent state ground.

A

The first jurisdictional question is whether the Arizona Supreme Court issued a final judgment in the case. It granted plaintiffs a declaratory judgment that the state law governing mineral leases is invalid, but then remanded the case for the trial court to determine "just what further relief is appropriate." 155 Ariz., at 498, 747 P. 2d, at 1197. The United States, as *amicus*, asserts that the validity of existing leases remains at issue and that the trial court may yet decide to uphold the leases on the ground that they were made for "true value," and thus are in "substantial conformity" with the provisions of the Enabling Act, §28, 36 Stat. 574–575, even though the leasing procedures did not comply with every specific requirement in the Act. Brief for United States as *Amicus Curiae* 10–14 (hereafter Brief for United States).

If the assertion were correct, the judgment below would not yet be final within the meaning of 28 U. S. C. § 1257, and we would lack jurisdiction in the case. But it is not correct. Respondents originally sought a declaratory judgment that the state law is invalid, an injunction against further leases, and an accounting and payment of sums due under past leases; but they withdrew the last request on appeal to the Arizona Supreme Court. See Brief for Appellant in *Kadish* v. *Arizona State Land Dept.*, CV-86-0238-T, p. 6, n. 3, p. 40.

Thus, on remand the trial court does not have before it any federal question whether past and current leases are valid because they were made in "substantial conformity" with the terms of the Enabling Act. And, of course, the trial court's further actions cannot affect the Arizona Supreme Court's ruling that § 27–234(B) is invalid. Accordingly, the judgment below comes within two of the exceptions to the finality requirement that were set out in *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975). Here "the federal issue is conclusive" and "the outcome of further proceedings preordained." *Id.*, at 479; see also *Duquesne Light Co.* v. *Barasch*, 488 U. S. 299 (1989). In addition, the "'federal questions that could come here have been adjudicated by the State court,'" and the remaining issues, contrary to the United States' suggestion, will not give rise to any further federal question. *Cox*, *supra*, at 480, quoting *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 127 (1945).

B

The second jurisdictional issue is of some theoretical import, though infrequent in occurrence. The question is whether, under federal standards, the case was nonjusticiable at its outset because the original plaintiffs lacked standing to sue; and if so, whether we may examine justiciability at this stage because the Arizona courts heard the case and proceeded to judgment, a judgment which causes concrete injury to the parties who seek now for the first time to invoke the authority of the federal courts in the case.

1

The United States contends that the case should be dismissed for lack of standing, since neither respondent taxpayers nor respondent teachers association, who were the original plaintiffs, would have satisfied the requirements for bringing suit in federal court at the outset. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). Although standing in its outer dimensions is a prudential concept to be shaped by the decisions of the courts as a matter of sound judicial policy and subject to the control of Congress, at its core it becomes a constitutional question; for standing in its most basic aspect can be one of the controlling elements in the definition of a case or controversy under Article III. See *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U. S. 464, 471–476 (1982); *id.*, at 490–494 (BRENNAN, J., dissenting). The standing of respondents if they had filed suit in federal court at the trial level may be resolved by applying well-settled principles of federal law.

The question whether taxpayers or citizens have a sufficient personal stake to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens covers old and familiar ground. As an ordinary matter, suits premised on federal taxpayer status are not cognizable in the federal courts because a taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, of any payments out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for [judicial intervention]." *Frothingham* v. *Mellon*, 262 U. S. 447, 487 (1923) (decided with *Massachusetts* v. *Mellon*).

We have indicated that the same conclusion may not hold for municipal taxpayers, if it has been shown that the "peculiar relation of the corporate taxpayer to the [municipal] corporation" makes the taxpayer's interest in the application of municipal revenues "direct and immediate." *Frothingham*, *supra*, at 486–487, citing *Crampton* v. *Zabriskie*, 101 U. S. 601, 609 (1880). Yet we have likened state taxpayers to federal taxpayers, and thus we have refused to confer standing upon a state taxpayer absent a showing of "direct injury," pecuniary or otherwise. *Doremus* v. *Board of Education of Hawthorne*, 342 U. S. 429, 434 (1952).

No such showing has been made in this case, and respondent taxpayers do not allege any special circumstances or exceptions that would confer standing upon them. Instead, they have simply asserted that the Arizona statute governing mineral leases has "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes." Complaint ¶ III. Even if the first part of that assertion were correct, however, it is pure speculation whether the lawsuit would result in any actual tax relief for respondents. If they were to prevail, it is conceivable that more money might be devoted to education; but since education in Arizona is not financed solely from the school trust fund, Tr. of Oral Arg. 8–10, the State might reduce its supplement from the general funds to provide for other programs. The possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is "remote, fluctuating and uncertain," as stated in *Frothingham*, *supra*, at 487, and consequently the claimed injury is not "likely to be redressed by a favorable decision," *Valley Forge*, *supra*, at 472.

The same flaw defeats the claim that the teachers association would have had standing to bring this suit originally in federal court. The association and its members contend that the state law "imposes an adverse economic impact" on them. Complaint ¶ IV. Yet even if invalidation of the state law would create increased revenue for the school trust funds in the near future, an issue much disputed here, the allegations of economic harm rest on the same hypothetical assumptions as do the taxpayer claims. If respondents prevailed and increased revenues from state leases were available, maybe taxes would be reduced, or maybe the State would reduce support from other sources so that the money available for schools would be unchanged. Even if the State were to devote more money to schools, it does not follow that there would be an increase in teacher salaries or benefits. These policy decisions might be made in different ways by the governing officials, depending on their perceptions of wise state fiscal policy and myriad other circumstances. Whether the association's claims of economic injury would be redressed by a favorable decision in this case depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict. We have much less confidence in concluding that relief is likely to follow from a favorable decision here than we had in cases like *Allen* v. *Wright*, 468 U. S. 737 (1984), and *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26 (1976), where standing was found to be lacking because the probable response of private individuals to explicit tax incentives was judged to be too uncertain to satisfy the redressability prong of federal standing requirements.

Petitioners also argue that the "likelihood" of a redressable injury is increased once it is recognized that the claims of the taxpayers and the teachers association rest upon independent contingencies. The implication is that the Court should cumulate the probabilities, in the event that plaintiffs prevail, of either the taxpayers receiving direct relief from the increased revenues or the teachers receiving indirect economic benefit from higher funding for schools. Reply Brief for Petitioners 14–15. This line of reasoning evokes two responses. First, it does not avoid the fundamental problem that the courts are unable to evaluate with any assurance the "likelihood" that decisions will be made a certain way by policymaking officials acting within their broad and legitimate discretion. Second, the doctrine of standing to sue is not a kind of gaming device that can be surmounted merely by aggregating the allegations of different kinds of plaintiffs, each of whom may have claims that are remote or speculative taken by themselves. Instead, the basic inquiry, for *each* party seeking to invoke the authority of the federal courts, *Warth*, *supra*, at 498–499, is whether that party alleges personal injury that is fairly traceable to the challenged conduct and likely to be redressed by the requested relief. *Valley Forge*, 454 U. S., at 472.

When the allegations of economic injury are put to one side, the claims made by both the taxpayers and the teachers association reduce to something like the association's contention that the state law undermines "the quality of education in Arizona." Complaint ¶ IV. We cannot say with any certainty that this contention is even likely to be correct. The claims raised here, moreover, are the kind of generalized grievances brought by concerned citizens that we have consistently held are not cognizable in the federal courts. See *Los Angeles* v. *Lyons*, 461 U. S. 95, 111–112 (1983); *Valley Forge, supra,* at 482–487; *Sierra Club* v. *Morton*, 405 U. S. 727, 736–740 (1972); see also *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208 (1974); *United States* v. *Richardson*, 418 U. S. 166 (1974).

Our precedents demonstrate that a party may establish standing by raising claims of noneconomic injury, see, *e. g.*, *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91 (1979); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205 (1972); but claims of injury that are purely abstract, even if they might be understood to lead to "the psychological consequence presumably produced by observation of conduct with which one disagrees," *Valley Forge, supra,* at 485, do not provide the kind of particular, direct, and concrete injury that is necessary to confer standing to sue in the federal courts. Although the members of the teachers association might argue that they have a special interest in the quality of education in Arizona, such a special interest does not alone confer federal standing. Cf. *Sierra Club, supra,* at 739–740. The argument does not succeed in distinguishing the members in this regard from students, their parents, or various other citizens.

Our review discloses no basis on which to find that respondents would satisfy the requirements for federal standing articulated by our precedents. It follows that the suit would have been dismissed at the outset were the federal rule to apply.

2

But the state judiciary here chose a different path, as was their right, and took no account of federal standing rules in letting the case go to final judgment in the Arizona courts. That result properly follows from the allocation of authority in the federal system. We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute. See, *e. g., Pennell* v. *San Jose*, 485 U. S. 1, 8 (1988); *Lyons, supra*, at 113; *Doremus*, 342 U. S., at 434; *Secretary of State of Md.* v. *J. H. Munson Co.*, 467 U. S. 947, 971 (1984) (STEVENS, J., concurring); *Bateman* v. *Arizona*, 429 U. S. 1302, 1305 (1976) (REHNQUIST, J., in chambers); cf. *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608, 612 (1937).

Although the state courts are not bound to adhere to federal standing requirements, they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law. See 28 U. S. C. § 1738; *Grubb* v. *Public Utilities Comm'n of Ohio*, 281 U. S. 470 (1930). Indeed, inferior federal courts are not required to exist under Article III, and the Supremacy Clause explicitly states that "the Judges in every State shall be bound" by federal law. U. S. Const., Art. VI, cl. 2.

The question now arises whether a judgment rendered by the state courts in these circumstances can support jurisdiction in this Court to review the case. At this juncture, petitioners allege a specific injury stemming from the state-court decree, a decree which rests on principles of federal law.

Petitioners insist that, as a result of the state-court judgment, the case has taken on such definite shape that they are under a defined and specific legal obligation, one which causes them direct injury.

We agree. Although respondents would not have had standing to commence suit in federal court based on the allegations in the complaint, they are not the party attempting to invoke the federal judicial power. Instead it is petitioners, the defendants in the case and the losing parties below, who bring the case here and thus seek entry to the federal courts for the first time in the lawsuit. We determine that petitioners have standing to invoke the authority of a federal court and that this dispute now presents a justiciable case or controversy for resolution here.

Petitioners hold mineral leases that were granted under the state law the Arizona Supreme Court invalidated. Although no accounting of sums due under these leases remains at issue in this particular case, it is undisputed that the decision to be reviewed poses a serious and immediate threat to the continuing validity of those leases by virtue of its holding that they were granted under improper procedures and an invalid law. The state proceedings ended in a declaratory judgment adverse to petitioners, an adjudication of legal rights which constitutes the kind of injury cognizable in this Court on review from the state courts. See, *e. g.*, *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 261–265 (1933). Petitioners are faced with "actual or threatened injury" that is sufficiently "distinct and palpable" to support their standing to invoke the authority of a federal court. *Warth*, 422 U. S., at 500, 501.

Petitioners contend before us that the Arizona Supreme Court's decision rests on an erroneous interpretation of federal statutes. They claim that the declaratory judgment sought and secured by respondents, along with the relief that may flow from that ruling, is invalid under federal law. If we were to agree with petitioners, our reversal of the decision below would remove its disabling effects upon them. In these circumstances, we conclude that petitioners meet each prong of the constitutional standing requirements. As the parties first invoking the authority of the federal courts, they have shown that they "personally ha[ve] suffered some actual or threatened injury as a result of the putatively illegal conduct of the [other party] . . . and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Valley Forge*, 454 U. S., at 472 (citations omitted). In addition, petitioners' standing to invoke the authority of this Court is not affected by any of the prudential limitations that have been identified in prior cases. *Id.*, at 474–475. Indeed, the United States appears to recognize the force of these points. See Brief for United States 20, n. 14 ("[I]n light of the decision below, [petitioners] may now have standing" to invoke the authority of a federal court).

We also conclude that "the record shows the existence of a genuine case or controversy essential to the exercise of the jurisdiction of this Court." *Tileston* v. *Ullman*, 318 U. S. 44, 46 (1943). These parties remain adverse, and "valuable legal rights . . . will be directly affected to a specific and substantial degree by the decision of the question of law." *Wallace*, 288 U. S., at 262. We are not confronted, certainly, with parties "attempting to secure an abstract determination by the Court of the validity of a statute . . . or a decision advising what the law would be on an uncertain or hypothetical state of facts," *ibid.*, as might be the case, for example, if petitioners were seeking review of an advisory opinion rendered through specific mechanisms for obtaining a hypothetical ruling from a state court or other state official. The proceedings here were judicial in nature, and resulted in a final judgment altering tangible legal rights. This proceeding constitutes a cognizable case or controversy. Cf. *In re Summers*, 325 U. S. 561, 568–569 (1945).

Although petitioners satisfy the requirements of federal standing and present an actual case or controversy for decision here, the United States contends that this showing is insufficient to support our jurisdiction. The Government suggests that the appropriate order is dismissal, and that petitioners are then free "to bring a declaratory judgment action in federal court" raising these same claims. Brief for United States 20, n. 14. Petitioners counter that if the Court finds it cannot review the judgment on the merits, the proper course is to vacate the judgment below and remand for appropriate further proceedings, Tr. of Oral Arg. 13–15, as we have done at least on some occasions when a case becomes moot while it is pending on review from a state court, see, *e. g.*, *DeFunis* v. *Odegaard*, 416 U. S. 312, 320 (1974). Neither disposition is appropriate here.

If we were to vacate the judgment below on the ground that respondents lacked federal standing when they brought suit initially, that disposition would render nugatory the entire proceedings in the state courts. The clear effect would be to impose federal standing requirements on the state courts whenever they adjudicate issues of federal law, if those judgments are to be conclusive on the parties. That result, however, would be contrary to established traditions and to our prior decisions recognizing that the state courts are not bound by Article III and yet have it within both their power and their proper role to render binding judgments on issues of federal law, subject only to review by this Court.

In addition, we doubt it would be a proper exercise of our authority to vacate the state court's judgment in these circumstances. It would be an unacceptable paradox to exercise jurisdiction to confirm that we lack it and then to interfere with a State's sovereign power by vacating a judgment rendered within its own proper authority. This case is not one committed to the exclusive jurisdiction of the federal courts. We have no authority to grant a writ only to announce that, solely because we may not review a case, the state court lacked power to decide it in the first instance.[1]

If we were merely to dismiss this case and leave the judgment below undisturbed, a different set of problems would ensue. Although the judgment of a state court on issues of federal law normally binds the parties in any future suit even if that suit is brought separately in federal court, we have occasionally cautioned that such a judgment may well *not* bind the parties if the state court's conclusions about federal law were not subject to any federal review. See, *e. g., Doremus*, 342 U. S., at 434 ("[W]e cannot accept . . . as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute" a case or controversy); *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 557 (1940) (this Court is responsible for assuring "that state courts will not be the final arbiters of important issues under the federal constitution"); *Fidelity Nat. Bank & Trust*

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[1] The Court's treatment of cases that become moot on review from the lower federal courts, as distinct from those that become moot on review from state courts, is illuminating on this point. In the former situation, the settled disposition of a case that has become entirely moot is for this Court to "vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950). The power to make that disposition is predicated on our "supervisory power over the judgments of the lower federal courts," which "is a broad one." *Id.*, at 40. In the latter situation, on review of state judgments, the same disposition is not made. Traditionally, where the entire case had become moot, the Court vacated the judgment below and remanded for such further proceedings as the state court might deem appropriate, as in *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974), since the state courts, not bound by Article III, were free to dispose of the case in a variety of ways, including reinstatement of the judgment. More recently, however, the regular practice in the latter situation has been to dismiss the case and leave the judgment of the state court undisturbed, which evinces a proper recognition that in the absence of any live case or controversy, we lack jurisdiction and thus also the power to disturb the state court's judgment. See, *e. g., Kansas Gas & Elec. Co.* v. *State Corp. Comm'n of Kan.*, 481 U. S. 1044 (1987); *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 420 U. S. 985 (1975).

Co. of Kansas City v. *Swope*, 274 U. S. 123, 130–131 (1927) (proceeding in state court is res judicata if "the constitutional rights asserted, or which might have been asserted in that proceeding, could eventually have been reviewed here"). The predominant interest promoted by this apparent exception to normal preclusion doctrines is to assure that the binding application of federal law is uniform and ultimately subject to control by this Court. See *Richardson* v. *Ramirez*, 418 U. S. 24, 42, n. 13 (1974) (this Court may review a declaratory judgment granted by a state court, for "any other conclusion would unnecessarily permit a state court of last resort, quite contrary to the intention of Congress in enacting 28 U. S. C. § 1257, to invalidate state legislation on federal constitutional grounds without any possibility of state officials who were adversely affected by the decision seeking review in this Court").

Given the likelihood that dismissal in this case would defeat the normal preclusive effects of the state court's judgment, however, the effect again would be to impose federal standing requirements on a state court that sought to render a binding decision on issues of federal law. It also would denigrate the authority of the state courts by creating a peculiar anomaly in the normal channels of appellate review. The *Rooker-Feldman* doctrine interprets 28 U. S. C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in this Court. *District of Columbia Court of Appeals* v. *Feldman*, 460 U. S. 462 (1983); *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 296 (1970); *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 415–416 (1923). The United States urges that the proper course for petitioners is to sue in federal trial court in order to readjudicate the very same issues that were determined in the state-court proceedings below. Brief for United States 20, n. 14. That action, in essence, would be an attempt to obtain direct review of the Arizona Supreme Court's decision in the lower federal courts, and would represent a partial inroad on *Rooker-Feldman's* construction of 28 U. S. C. § 1257.

For these reasons, we believe it would be inappropriate to dismiss the case at this stage.[2] That disposition would come at the cost of much disrespect to state-court proceedings and judgments. It also would require petitioners to commence a new action in federal court to vindicate their rights under federal law, even though right now they present us with a case or controversy that is justiciable under federal standards. Cf. *Wallace*, 288 U. S., at 262–263 (a justiciable controversy is not "any the less so because through a modified procedure appellant has been permitted to present it in the state courts"). Instead, we adopt the following rationale for our decision on this jurisdictional point: When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.

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[2] None of the precedents cited by the parties, and none that we have found, is squarely on point. In *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947 (1984), the original defendant brought an appeal to defend the constitutionality of a state statute declared unconstitutional by the state court, but the Court began by evaluating the standing of the original plaintiffs, as we do here, and found that they did meet the requirements for federal standing, which obviated any further inquiry. *Id.*, at 954–959. The same is not true in this case. In *Revere* v. *Massachusetts General Hospital*, 463 U. S. 239 (1983), the Court found that the original plaintiff met the requirements imposed by Article III, and then refused to invoke the prudential limitation of *jus tertii*, at least in part so as to avoid any question of "leaving intact the state court's judgment in favor of [the original plaintiff], the purportedly improper representative of the third party's constitutional rights." *Id.*, at 243. In *Doremus* v. *Board of Education of Hawthorne*, 342 U. S. 429 (1952), an appeal brought from state court by a *losing* taxpayer plaintiff was dismissed, because in that instance the party seeking to invoke the authority of the federal courts was found to lack standing, as would be true of the taxpayer plaintiffs in this case as well. *Id.*, at 432–435. Yet here petitioners are the injured parties who seek to invoke the authority of this Court, and they meet the federal standing requirements.

We are not unmindful of the paradox that would result if respondents (plaintiffs below) prevail on the merits, for then they will have succeeded in obtaining a federal determination here that would have been unavailable if the action had been filed initially in federal court. Nonetheless, although federal standing "often turns on the nature and source of the claim asserted," it "in no way depends on the merits of the [claim]." *Warth*, 422 U. S., at 500. The rule we adopt is necessary in deference to the States and in response to the petitioning parties who seek this forum to redress a real and current injury stemming from the application of federal law.

We therefore conclude that we may properly decide this case. Petitioners meet the requirements for federal standing under *Valley Forge*. Because they are the parties first invoking the authority of the federal courts in this case, and an actual case or controversy is before the Court, there is no jurisdictional bar to review. In these circumstances, and having already granted review, we believe the proper course is not to dismiss the case or to vacate the judgment below, but to undertake review of the federal issues on their merits.

C

The last threshold procedural issue concerns the possibility that the decision below rested on an adequate and independent state ground that would defeat review of the federal issues by this Court. See, *e. g., Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210 (1935). Here the state court mentioned the State Constitution several times in its opinion but otherwise relied exclusively on federal law, including an extended discussion of the applicable federal statutes and their legislative histories. 155 Ariz., at 486–487, 747 P. 2d, at 1185–1186. In its conclusion, however, the Arizona Supreme Court directed the trial court "to enter a judgment declaring

A. R. S. § 27–234 unconstitutional and invalid as it pertains to nonhydrocarbon mineral leases." *Id.*, at 498, 747 P. 2d, at 1197.

We conclude that the opinion below is not based on an adequate and independent state ground. Its discussion focuses solely on the federal statutes, and the State Constitution is never mentioned on its own apart from the Enabling Act. The Arizona Supreme Court explicitly considered itself "bound to adopt the construction advanced by [plaintiffs]" based on the prior decisions of this Court, and described Article 10 of the Arizona Constitution as simply a "rescript" of § 28 of the Enabling Act. *Id.*, at 495–496, 747 P. 2d, at 1194–1195. In light of this description, the references to the Arizona Constitution simply reflect a holding which rests on the state court's interpretation of federal law. Although the Arizona Supreme Court was free to rest its holding on the State Constitution as an independent ground, the decision below did not divorce the state constitutional issue from the questions of federal law. See *Enterprise Irrigation Dist.* v. *Canal Co.*, 243 U. S. 157, 164 (1917); see also 155 Ariz., at 495, 747 P. 2d, at 1194 ("The Enabling Act is the 'fundamental and paramount law' in Arizona," quoting *Murphy* v. *State*, 65 Ariz. 338, 345, 181 P. 2d 336, 340 (1947)).

In sum, we do not lack jurisdiction to review the decision below.

III

The issue on the merits is whether Arizona may lease mineral lands granted from the United States without meeting the specific requirements imposed by federal statute. We begin with a more detailed review of the statutes in question.

In 1910, Congress passed the New Mexico-Arizona Enabling Act, 36 Stat. 557, which authorized the people of those Territories to form state governments. Among its other provisions, the Enabling Act granted Arizona certain lands within every township for the support of public schools. Congress provided, however, that the new State would hold those granted lands in trust and subject to the specific conditions set out in § 28 of the Act, 36 Stat. 574–575. Under the conditions, the granted lands could not be sold or leased except to the highest bidder at a public auction following notice by advertisements in two newspapers weekly for 10 weeks. Leases for a term of five years or less were exempt from the advertising requirement. Lands could not be sold or leased for less than the values set by an appraisal required by the statute. All proceeds derived from the lands would go to a permanent segregated fund, and interest, but not principal, was to be spent for support of public schools. Arizona incorporated those restrictions in its proposed constitution, Ariz. Const., Art. 10, and was admitted to the Union in 1912.

The grant of lands in the Enabling Act specifically excluded mineral lands, §§ 6, 24, 36 Stat. 561–562, 572, but this gave rise to uncertainty about what are known as "unknown" mineral lands, those lands on which minerals were not discovered until after the grant. In two subsequent decisions, this Court held that the exclusion applied only to lands known to be mineral at the time of the grant, and that unknown mineral lands *were* granted under the Act. *Wyoming* v. *United States*, 255 U. S. 489, 500–501 (1921); *United States* v. *Sweet*, 245 U. S. 563, 572–573 (1918). These holdings in turn spawned numerous disputes over whether lands were known to be mineral at the time they were granted from the Federal Government. See, *e. g.*, *Work* v. *Braffet*, 276 U. S. 560, 561–563 (1928). Title to lands in many Western States was in doubt, and the issue became more difficult to prove as the years passed. Accordingly, in 1927 Congress passed the Jones Act, 44 Stat. 1026, a brief statute that extended the terms of the original grant of lands in the Western States to encompass mineral lands as well. Congress also has amended the Enabling Act twice, each time to clarify the procedures for leasing granted lands for specific purposes. See Act of June 5, 1936, ch. 517, 49 Stat. 1477; Act of June 2, 1951, 65 Stat. 51.

Arizona's own law governing the leasing of state mineral lands, enacted in 1941, requires every such lease to "provide for payment to the state by the lessee of a royalty of five per cent of the net value of the minerals produced from the claim." Ariz. Rev. Stat. Ann. § 27-234(B) (Supp. 1988). But it does not require those lands to be advertised or appraised before they are leased and does not require the lands to be leased at their full appraised value. The lands in question here were granted to Arizona either in 1910, by the terms of the Enabling Act itself, or in 1927, under the Jones Act.

The grant of all lands under the Enabling Act is conditioned, by the statute's clear language, upon the specified requirements for leasing or selling those lands. The Act declares that "*all lands* hereby granted . . . shall be by the said State held in trust, to be disposed of in whole or in part *only in the manner as herein provided*, . . . and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same." § 28, 36 Stat. 574, 575 (emphasis added). "Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, . . . in any manner contrary to the provisions of this Act, shall be deemed a breach of trust." Any such disposition is expressly stated to be "null and void" unless "made in substantial conformity with the provisions of this Act." *Ibid.* And, again, the requirements set forth in the Act apply to "[a]ll lands, leaseholds, timber, and other products of land." *Ibid.*

Petitioners cite *Neel* v. *Barker*, 27 N. M. 605, 204 P. 205 (1922), as standing for the proposition that because mineral lands originally were exempted by Congress from the grant made in the Enabling Act, its provisions for the sale or lease of granted lands did not apply to those lands later determined to be mineral in nature. That proposition, never tested in a federal court, is flawed in two respects. First, in *Wyoming* v. *United States*, *supra*, decided the year before but not mentioned or discussed in *Neel*, this Court held that unknown mineral lands *were* within the grant made by Congress. Second, since those lands were granted to the States under the authority of the Enabling Act itself, they could not be regarded as unburdened by its mandatory conditions. In consequence, the New Mexico Supreme Court erred in concluding that because "Congress did not intend to grant to the state any mineral lands . . . it follows that the state is not controlled nor restricted by said act in regard to leasing said lands for mineral purposes." 27 N. M., at 611, 204 P., at 207. All the lands granted under the Act are granted subject to its conditions.[3]

The lands granted under the Jones Act are subject to the same conditions. This very brief enactment was passed to address the continuing problems associated with the dual regime, under which the adjudication of title to lands would depend on whether they were known to be mineral at the time the Federal Government granted them. H. R. Rep. No. 1761, 69th Cong., 2d Sess., 2–3 (1927); S. Rep. No. 603, 69th Cong., 1st Sess., 1–6 (1926). Indeed, its formal title was: "An Act Confirming in States and Territories title to lands granted by the United States in the aid of common or public schools." 44 Stat. 1026. The Jones Act resolved the problem of the dual regime by simply "extend[ing]" the prior grants of lands "to embrace numbered school sections mineral in character." § 1, 44 Stat. 1026. The statute explicitly stated that "the grant of numbered mineral sections under this Act *shall be of the same effect as prior grants for the numbered non-mineral sections.*" § 1(a), 44 Stat. 1026 (emphasis added).

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[3] One possible distinction between mineral leases and the lease of lands for other purposes is that mineral rights can be difficult to appraise, which might make the Enabling Act's provisions less helpful in this setting. But this Court recognized long ago that such rights are subject to valuation in condemnation proceedings, and that whatever the difficulties may be in making such appraisals with complete accuracy, it does not defeat the existence of a "market value" in mineral rights, and it does not suffice as a reason to depart from the ordinary requirements that the law imposes on such transactions. *Montana R. Co.* v. *Warren*, 137 U. S. 348, 352–353 (1890).

Petitioners make two points about the proper reading of this statute. First, they argue that the "same effect" language was intended only to assure that the title to these lands passed and vested in the same manner and with the same validity as did the title to lands granted under the Enabling Act, but said nothing about the conditions upon which those lands were granted. Second, they argue that the language of § 1(b) of the Jones Act granted the States a broad authority to lease the mineral deposits in the newly granted lands "by the State as the State legislature may direct," with "the proceeds of rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools." 44 Stat. 1026–1027. According to petitioners, therefore, the Jones Act did not impose the same restrictions on mineral lands as did the Enabling Act; on the contrary, it explicitly repudiated any such restrictions on the newly granted lands.

We do not agree with this reading of the Jones Act. First, the suggested interpretation of the "same effect" language would render that language redundant: The statute continues immediately with an additional clause that directly addresses the "vest[ing]" of "titles to such numbered mineral sections." § 1(a), 44 Stat. 1026. Instead, we believe that the "same effect" language has independent meaning, and that it achieved Congress' stated objective of "extend[ing]" the 1910 grants to encompass all mineral lands and of "[c]onfirming" title to such lands in the States. 44 Stat. 1026.

Second, the language of § 1(b) does not undermine the conclusion that § 1(a) of the Jones Act extended the coverage of the Enabling Act's express restrictions as well as of its grant of lands. Section 1(b) says that though the mineral *lands* may be sold, the rights to mine and remove the minerals themselves are reserved to the State and may only be leased. Such leases may be undertaken "as the State legislature may direct." Petitioners would read § 1(b) as containing the sole dispositional restrictions on the newly granted lands, and would read the latter passage as a blanket authority for the States to lease minerals on whatever terms they wish to set, as long as the proceeds of those leases go to the schools.

This interpretation suffers from several defects. To begin with, it does not offer a comprehensive understanding of the statutory regime. Section 1(b) contains no dispositional restrictions on the sale or lease of the newly granted *lands* except for the provision that the mineral rights on those lands are reserved to the State. If the "same effect" language in § 1(a) does not extend the dispositional restrictions in the Enabling Act to the lands granted in the Jones Act, then those lands are subject to no dispositional restrictions at all, though their mineral rights would be reserved. This is inconsistent with the view that the lands granted under the Jones Act are part of the school trust. Similarly, if the "as the State legislature may direct" language is the blanket authority for which petitioners contend, it would allow minerals to be leased for little or no royalty, and thus would leave room for all the abuses that the establishment of a school trust was designed to prevent.

Perhaps the most fundamental defect of the interpretation urged by petitioners is that it would largely perpetuate the dual regime that Congress sought to eliminate by enacting the Jones Act. Under that interpretation, the restrictions in the Enabling Act would continue to apply to unknown mineral lands, but would not apply to known mineral lands. As a result, for example, some of the leases involved in this case might be proper, under the Jones Act, while others would be improper, under the Enabling Act, and the critical difference would rest on a determination, to be made at some future point, whether those lands were known to be mineral in 1910. This is surely not the resolution Congress intended when it passed this statute, and it is neither a sensible nor an appealing one.[4]

In addition, the "as the State legislature may direct" language is not inconsistent with the express restrictions set forth in the Enabling Act. Given the preceding restrictions on the *sale* of minerals in § 1(b), Congress may have thought it necessary to emphasize that *leases* were subject to no such novel limitations; instead, the States retained all the authority given under the conditional grants made in the Enabling Act. We thus agree with the court below that this language is properly viewed as authorizing the States to regulate the methods by which mineral leases are made and to specify any additional terms in those leases that are thought necessary or desirable, as long as the leases comply with the dispositional requirements set forth in the Enabling Act. See 155 Ariz., at 491, 747 P. 2d, at 1190. But this language, in and of itself, does not dispense with those restrictions.[5]

Both sides place a great deal of emphasis on the later amendments to the Enabling Act, which occurred in 1936 and

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[4] Under the reading of the Jones Act we adopt, there may still be traces of the dual regime, though they are minimized. For example, it might be argued that "the right to prospect for, mine, and remove" minerals on unknown mineral lands can be sold, whereas those same rights on known mineral lands cannot, since the Jones Act's prohibition in this regard is limited to those lands in "the additional grant made by this Act." § 1(b), 44 Stat. 1026. We need not decide in this case, however, whether that reading of the statute is fair or necessary.

[5] In the wake of the enactment of the Jones Act in 1927, the experience of New Mexico is instructive as a contemporaneous reading of the statute. Concerned that the Act had undermined whatever basis there might have been for the decision in *Neel* v. *Barker*, 27 N. M. 605, 204 P. 205 (1922), the New Mexico government immediately petitioned Congress to authorize a state plebiscite to codify its holding as law. In response, Congress passed a joint resolution to that effect. Joint Resolution No. 7, ch. 28, 45 Stat. 58. The language of the resolution explicitly permitted New Mexico to waive the advertising, appraisal, and bidding requirements on all mineral leases. This explicit language was conspicuously absent from the Jones Act itself.

1951. We think that the language of the original grants of these lands to Arizona is the decisive basis for decision here, and that subsequent amendments are at best only illustrative of how a later Congress read the original terms of the statute. Congress could not, for instance, grant lands to a State on certain specific conditions and then later, after the conditions had been met and the lands vested, succeed in upsetting settled expectations through a belated effort to render those conditions more onerous. Congress could relax the conditions upon which lands had been granted previously, of course, but we see nothing in the later amendments here to suggest that it has done so. Instead, the later amendments are wholly consistent with the view that Congress granted these lands in 1910 and 1927 subject to the conditions discussed previously and has never removed those conditions.[6]

In both the 1936 and the 1951 amendments, Congress reiterated the formulation that the lands could be leased for certain purposes as the state legislature "may direct," Act of June 5, 1936, ch. 517, 49 Stat. 1477, and as it "may prescribe," Act of June 2, 1951, 65 Stat. 52. But the former amendment did not alter the application of § 28 to "[a]ll lands . . . and other products of land," which remained in a passage which directly followed the "as the State legislature may direct" language. And the latter amendment altered the application of § 28 in a manner that tends to confirm the interpretation adopted here: It *expressly* extinguished the advertising, bidding, and appraisal restrictions upon any leases of these lands "for the exploration, development, and production of oil, gas, and other hydrocarbon substances," 65 Stat. 52, though not upon leases for other purposes, such as mineral leases. Thus the subsequent history of these statutes, to the extent it indicates anything of significance, merely confirms that the original restrictions upon the sale or lease of mineral lands contained in the Enabling Act and the Jones Act remain undiminished in force.

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[6] The decision in *Lassen* v. *Arizona Highway Dept.*, 385 U. S. 458 (1967), has no bearing on the issues raised in this case. In *Lassen*, the Court held that Arizona was not obliged to follow the Enabling Act's specific requirements when it condemned land for use in its highway program, seeing "no need to read the Act to impose these restrictions on transfers in which the abuses they were intended to prevent are not likely to occur, and in which the trust may in another and more effective fashion be assured full compensation." *Id.*, at 464. Unlike public condemnation proceedings, however, the private sales and leases at issue here are precisely the kinds of transactions addressed by the federal statutes. *Ibid.*

IV

"The Court's concern for the integrity of the conditions imposed by the [Enabling Act] has long been evident." *Alamo Land & Cattle Co.* v. *Arizona*, 424 U. S. 295, 302 (1976). We conclude that the sale or lease of mineral lands granted to the State of Arizona under these federal statutes must substantially conform to the mandatory requirements set out in the Enabling Act. The court below was correct in declaring Ariz. Rev. Stat. Ann. § 27–234(B) (Supp. 1988) invalid as to nonhydrocarbon mineral leases. The judgment of the Arizona Supreme Court is

Affirmed.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring in part and concurring in the judgment.

I join all but Part II–B–1 of the Court's opinion. I disagree both with the view expressed in JUSTICE KENNEDY's opinion that the plaintiffs below, particularly the Arizona Education Association, had no standing, and also with the decision to reach that issue. The Court holds in Part II–B–2 that the question whether the state-court plaintiffs had Article III standing is irrelevant when it is the defendants below who now invoke the authority of the federal courts. The discussion of the standing question in Part II–B–1 is therefore unnecessary.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA joins, concurring in part and dissenting in part.

I join Part I of the Court's opinion, and I also agree with JUSTICE KENNEDY's conclusion in Part II–B–1 that respondents, plaintiffs below, have failed to show the sort of "injury in fact" necessary to satisfy Article III standing requirements. *Ante*, at 612–617. This requirement "tends to assure that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U. S. 464, 472 (1982). For me, absence of standing disposes of this case and requires dismissal of the appeal. *Doremus* v. *Board of Education of Hawthorne*, 342 U. S. 429 (1952).

In *Doremus*, we dismissed an appeal from state court by taxpayers because they lacked standing. The Court now says that although the *Doremus* case is good law for plaintiffs who lack standing but lost in the state court on the merits of their federal claim, it is not good law for such plaintiffs who prevailed on the merits of their federal question in the state courts. The fact that such a rule has a very one-sided application does not necessarily mean it is wrong, but it should at least require a very persuasive justification—a more persuasive one than the Court provides in its opinion.

The Court justifies the result it reaches by saying that the state-court judgment adverse to petitioners is itself a form of "injury" which supplies Article III standing. The difficulty with this explanation is that petitioners—mineral lessees and defendants in the courts below—have always been able to show that a judgment adverse to their position would "injure" them in a very real sense. The defect in the state-court proceedings, so far as Article III standing is concerned, was not that the proceedings did not threaten to injure petitioners, but that the operation and enforcement of the challenged statute did not injure plaintiffs-respondents. The subsequent proceedings in the state court have obviously not cured this defect.

One could, of course, analogize the proceedings on certiorari in this Court to the commencement of what might be called the federal phase of the lawsuit, and say that for such purpose petitioners are like the plaintiff filing a suit in the federal district court: therefore it is petitioners' standing, not that of respondents, which should concern us at this stage of the litigation. Certainly some of our mootness cases following *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950), indicate that where a judgment entered in a lower federal court no longer has a present effect on the parties, we will not only not review the case but we will direct the vacation of the judgment of the lower courts. But while a present effect of the judgment on the parties may be a necessary condition for continuing federal jurisdiction, I do not believe that it is inevitably a sufficient condition.

The Court's opinion makes much of the fact that "'the record shows the existence of a genuine case or controversy,'" *ante*, at 619, and that "[t]hese parties remain adverse. . . ." *Ibid.* But most of our case law limiting federal standing does not depend on any conclusion that the parties were not "adverse" or that there was no "genuine case or controversy" in the lay sense of those terms. See *Warth* v. *Seldin*, 422 U. S. 490 (1975); *Valley Forge Christian College* v. *Americans United for Separation of Church & State*, *supra; DeFunis* v. *Odegaard*, 416 U. S. 312 (1974); *Linda R. S.* v. *Richard D.*, 410 U. S. 614 (1973). In each of these cases the parties were emphatically adverse to one another and vigorously contended with one another as to how the lawsuit should be decided. No one suggested that the cases were trumped up, or that they were "friendly suits." The shortcoming in each of them was the failure of the plaintiffs to establish actual injury to themselves as a result of the governmental action which they sought to challenge on federal grounds. To have considered their cases on the merits would have required us to decide the questions presented "in the rarified atmosphere of a debating society"; the plaintiffs had simply a generalized grievance about governmental action which they claimed was prohibited by federal statute or by the United States Constitution. And that is really all that the Court has before it in the present case.

The Court is concerned with the fact that if it applies *Doremus* as sauce for the goose as well as for the gander state courts will remain free to decide important questions of federal statutory and constitutional law without the possibility of review in this Court. This is true, but I think it a rather unremarkable proposition. Some state courts render advisory decisions on federal law of no binding force even within the State. See, *e. g.*, Mass. Const., Art. LXXXV (amending the Massachusetts Constitution to provide: "Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions"); Mich. Const., Art. 3, §8 ("Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date"). In each instance, the interpretation of federal law may affect the governance of the State and thereby make some people better off and some worse off. Yet none of these decisions of federal law are reviewable in this or any other federal court. I see no reason to fear that our dismissal of the present appeal would lead to a legal landscape in which we would no longer have the opportunity to review many important decisions on questions of federal law. Therefore I see no reason why this Court should bend its Article III jurisprudence out of shape to avoid a largely imaginary problem.

HILDWIN *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 88–6066. Decided May 30, 1989

Petitioner Hildwin was convicted of first-degree murder by a Florida jury. Since this crime is punishable by death or life imprisonment, state law requires that a separate sentencing proceeding be conducted, in which a jury makes an advisory recommendation but the court makes the ultimate decision whether to impose a death sentence, which it may impose after finding at least one aggravating factor. The court must make written findings to support its imposition of a death sentence. In Hildwin's case, the jury rendered a unanimous advisory sentence of death, and the judge imposed the death sentence, finding four aggravating circumstances and nothing in mitigation. The State Supreme Court affirmed the sentence, rejecting Hildwin's argument that the sentencing scheme violates the Sixth Amendment because it permits the imposition of death without a specific finding by the jury that sufficient aggravating circumstances exist to qualify the defendant for capital punishment.

Held: The Sixth Amendment does not require that the specific findings authorizing the imposition of the death sentence be made by a jury. Since the Court has held that the Amendment permits a judge to impose a death sentence when the jury recommends life imprisonment, *Spaziano* v. *Florida*, 468 U. S. 447, it follows that the Amendment does not forbid the judge to make written findings authorizing the imposition of a death sentence when the jury unanimously makes such a recommendation. There is no Sixth Amendment right to jury sentencing, even where the sentence turns upon specific aggravating circumstances. *McMillan* v. *Pennsylvania*, 477 U. S. 79. The existence of an aggravating factor is not an element of the offense but is a sentencing factor that comes into play only after a defendant has been found guilty.

Certiorari granted; 531 So. 2d 124, affirmed.

PER CURIAM.

This case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida. Petitioner, Paul C. Hildwin, Jr., was indicted for, and convicted of, first-degree murder. Under

Florida law, that offense is a capital felony punishable by death or life imprisonment. Fla. Stat. § 782.04(1)(a) (1987). Upon a defendant's conviction of a capital felony, the court conducts a separate sentencing proceeding after which the jury renders an advisory verdict. Fla. Stat. § 921.141 (Supp. 1988). The ultimate decision to impose a sentence of death, however, is made by the court after finding at least one aggravating circumstance. *Ibid.* If the court imposes a sentence of death, it must "set forth in writing its findings upon which the sentence of death is based." *Ibid.* In petitioner's case, the jury returned a unanimous advisory verdict of death, and the judge imposed the death sentence. In the order imposing the death sentence, the trial judge found four aggravating circumstances: petitioner had previous convictions for violent felonies, he was under a sentence of imprisonment at the time of the murder, the killing was committed for pecuniary gain, and the killing was especially heinous, atrocious, and cruel. The trial judge found nothing in mitigation.

On appeal to the Florida Supreme Court, petitioner argued that the Florida capital sentencing scheme violates the Sixth Amendment because it permits the imposition of death without a specific finding by the jury that sufficient aggravating circumstances exist to qualify the defendant for capital punishment. The court rejected this argument without discussion and affirmed petitioner's conviction and sentence of death. 531 So. 2d 124 (1988).*

In *Spaziano* v. *Florida*, 468 U. S. 447 (1984), we rejected the claim that the Sixth Amendment requires a jury trial on

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*Petitioner did not present this issue to the trial court, but raised it for the first time in the Florida Supreme Court. Respondent therefore argues that the decision below rests on an adequate and independent state ground. The Florida Supreme Court, however, did not rest its decision on this procedural argument, finding instead that there was "no merit" to petitioner's claim. 531 So. 2d, at 129. In these circumstances, we have jurisdiction to reach the merits. See *Caldwell* v. *Mississippi*, 472 U. S. 320, 327 (1985).

the sentencing issue of life or death. In that case, we upheld against Sixth Amendment challenge the trial judge's imposition of a sentence of death notwithstanding that the jury had recommended a sentence of life imprisonment. We stated: "The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause . . . does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial." *Id.*, at 459. We did not specifically note that the death sentence may only be imposed if the judge makes a written finding of an aggravating circumstance. If the Sixth Amendment permits a judge to impose a sentence of death when the jury recommends life imprisonment, however, it follows that it does not forbid the judge to make the written findings that authorize imposition of a death sentence when the jury unanimously recommends a death sentence.

Nothing in our opinion in *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), suggests otherwise. We upheld a Pennsylvania statute that required the sentencing judge to impose a mandatory minimum sentence if the judge found by a preponderance of the evidence that the defendant visibly possessed a firearm. We noted that the finding under Pennsylania law "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it." *Id.*, at 87–88. Thus we concluded that the requirement that the findings be made by a judge rather than the jury did not violate the Sixth Amendment because "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Id.*, at 93. Like the visible possession of a firearm in *McMillan*, the existence of an aggravating factor here is not an element of the offense but instead is "a sentencing factor that comes into play only after the defendant has been found guilty." *Id.*, at 86. Accordingly, the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted, and the judgment of the Supreme Court of Florida is

Affirmed.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 231 (1976), (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case.

Even if I did not hold this view, I would dissent from the Court's decision today to affirm summarily the decision below. I continue to believe that summary dispositions deprive litigants of a fair opportunity to be heard on the merits and create a significant risk that the Court is rendering an erroneous or ill-advised decision that may confuse the lower courts. See *Pennsylvania* v. *Bruder*, 488 U. S. 9, 11 (1988) (MARSHALL, J., dissenting); *Rhodes* v. *Stewart*, 488 U. S. 1, 4 (1988) (MARSHALL, J., dissenting); *Buchanan* v. *Stanships, Inc.*, 485 U. S. 265, 269 (1988) (MARSHALL, J., dissenting); *Commissioner* v. *McCoy*, 484 U. S. 3, 7 (1987) (MARSHALL, J., dissenting). This risk of error is particularly unacceptable in capital cases where a man's life is at stake. I dissent.

WARDS COVE PACKING CO., INC., ET AL. *v.* ATONIO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-1387. Argued January 18, 1989—Decided June 5, 1989

Jobs at petitioners' Alaskan salmon canneries are of two general types: unskilled "cannery jobs" on the cannery lines, which are filled predominantly by nonwhites; and "noncannery jobs," most of which are classified as skilled positions and filled predominantly with white workers, and virtually all of which pay more than cannery positions. Respondents, a class of nonwhite cannery workers at petitioners' facilities, filed suit in the District Court under Title VII of the Civil Rights Act of 1964, alleging, *inter alia*, that various of petitioners' hiring/promotion practices were responsible for the work force's racial stratification and had denied them employment as noncannery workers on the basis of race. The District Court rejected respondents' claims, finding, among other things, that nonwhite workers were overrepresented in cannery jobs because many of those jobs were filled under a hiring hall agreement with a predominantly nonwhite union. The Court of Appeals ultimately reversed in pertinent part, holding, *inter alia*, that respondents had made out a prima facie case of disparate impact in hiring for both skilled and unskilled noncannery jobs, relying solely on respondents' statistics showing a high percentage of nonwhite workers in cannery jobs and a low percentage of such workers in noncannery positions. The court also concluded that once a plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer to prove the challenged practice's business necessity.

Held:

1. The Court of Appeals erred in ruling that a comparison of the percentage of cannery workers who are nonwhite and the percentage of noncannery workers who are nonwhite makes out a prima facie disparate-impact case. Rather, the proper comparison is generally between the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market. *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 308. With respect to the skilled noncannery jobs at issue, the cannery work force in no way reflected the pool of *qualified* job applicants or the *qualified* labor force population. Petitioners' selection methods or employment practices cannot be said to have had a disparate impact on nonwhites if

the absence of minorities holding such skilled jobs reflects a dearth of qualified nonwhite applicants for reasons that are not petitioners' fault. With respect to the unskilled noncannery jobs, as long as there are no barriers or practices deterring qualified nonwhites from applying, the employer's selection mechanism probably does not have a disparate impact on minorities if the percentage of selected nonwhite applicants is not significantly less than the percentage of qualified nonwhite applicants. Where this is the case, the percentage of nonwhite workers found in other positions in the employer's labor force is irrelevant to a prima facie statistical disparate-impact case. Moreover, isolating the cannery workers as the potential labor force for unskilled noncannery jobs is both too broad—because the majority of cannery workers did not seek noncannery jobs—and too narrow—because there are many qualified persons in the relevant labor market who are not cannery workers. Under the Court of Appeals' method of comparison, any employer having a racially imbalanced segment of its work force could be haled into court and made to undertake the expensive and time-consuming task of defending the business necessity of its selection methods. For many employers, the only practicable option would be the adoption of racial quotas, which has been rejected by this Court and by Congress in drafting Title VII. The Court of Appeals' theory is also flawed because, if minorities are overrepresented in cannery jobs by virtue of petitioners' having contracted with a predominantly nonwhite union to fill those positions, as the District Court found, petitioners could eliminate respondents' prima facie case simply by ceasing to use the union, *without making any change whatsoever* in their hiring practices for the noncannery positions at issue. Pp. 650–655.

2. On remand for a determination whether the record will support a prima facie disparate-impact case on some basis other than the racial disparity between cannery and noncannery workers, a mere showing that nonwhites are underrepresented in the at-issue jobs in a manner that is acceptable under the standards set forth herein will not alone suffice. Rather, the courts below must also require, as part of respondents' prima facie case, a demonstration that the statistical disparity complained of is the result of one or more of the employment practices respondents are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites. This specific causation requirement is not unduly burdensome, since liberal discovery rules give plaintiffs broad access to employers' records, and since employers falling within the scope of the Uniform Guidelines on Employee Selection Procedures must maintain records disclosing the impact of tests and selection proce-

dures on employment opportunities of persons by identifiable race, sex, or ethnic group. Pp. 656–658.

3. If, on remand, respondents establish a prima facie disparate-impact case with respect to any of petitioners' practices, the burden of producing evidence of a legitimate business justification for those practices will shift to petitioners, but the burden of persuasion will remain with respondents at all times. This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts and with the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment practice was based solely on a legitimate, neutral consideration. See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 256–258. To the extent that some of this Court's decisions speak of an employer's "burden of proof" with respect to the business justification defense, they should be understood to mean an employer's burden of production, not persuasion. Even if respondents cannot persuade the trier of fact on the business necessity question, they may still prevail by coming forward with alternatives that reduce the disparate impact of petitioners' current practices, provided such alternatives are equally effective in achieving petitioners' legitimate employment goals in light of the alternatives' costs and other burdens. Pp. 658–661.

827 F. 2d 439, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 661. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 662.

Douglas M. Fryer argued the cause for petitioners. With him on the briefs were *Douglas M. Duncan* and *Richard L. Phillips*.

Abraham A. Arditi argued the cause and filed a brief for respondents.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Assistant Attorney General Clegg, Richard G. Taranto, David K. Flynn,* and *Lisa J. Stark;* for the American Society for Personnel Administration by *Lawrence Z. Lorber* and *J. Robert Kirk;* for the Chamber of Commerce of the United States by *Glen D. Nager, Andrew M. Kramer, David A. Copus, Patricia A. Dunn,* and *Stephen A. Bokat;* and for the Equal Em-

JUSTICE WHITE delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, makes it an unfair employment practice for an employer to discriminate against any individual with respect to hiring or the terms and condition of employment because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees in ways that would adversely affect any employee because of the employee's race, color, religion, sex, or national origin.[1] § 2000e–2(a). *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971), construed Title VII to proscribe "not only overt discrimination but also practices that are fair in form but discriminatory in practice." Under this basis for liability, which is known as the "disparate-impact" theory and which is involved in this case, a facially neutral

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ployment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, and *Edward E. Potter*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Joan E. Bertin*, *Isabelle Katz Pinzler*, and *John A. Powell;* for the Lawyers' Committee for Civil Rights Under Law by *Nicholas DeB. Katzenbach*, *Alan E. Kraus*, *Conrad Harper*, *Stuart J. Land*, *Norman Redlich*, *Richard T. Seymour*, and *James C. Gray, Jr.;* for the National Association for the Advancement of Colored People by *Grover G. Hankins* and *Alfred W. Blumrosen;* and for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Julius LeVonne Chambers*, *Charles Stephen Ralston*, *Ronald L. Ellis*, *Bill Lann Lee*, *Patrick O. Patterson, Jr.*, *Theodore M. Shaw*, *Antonia Hernandez*, and *E. Richard Larson*.

Clint Bolick, *Jerald L. Hill*, and *Mark J. Bredemeier* filed a brief for the Center for Civil Rights as *Amicus Curiae*.

[1] Title 42 U. S. C. § 2000e–2(a), provides:

"(a) It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate that is required in a "disparate-treatment" case.

I

The claims before us are disparate-impact claims, involving the employment practices of petitioners, two companies that operate salmon canneries in remote and widely separated areas of Alaska. The canneries operate only during the salmon runs in the summer months. They are inoperative and vacant for the rest of the year. In May or June of each year, a few weeks before the salmon runs begin, workers arrive and prepare the equipment and facilities for the canning operation. Most of these workers possess a variety of skills. When salmon runs are about to begin, the workers who will operate the cannery lines arrive, remain as long as there are fish to can, and then depart. The canneries are then closed down, winterized, and left vacant until the next spring. During the off-season, the companies employ only a small number of individuals at their headquarters in Seattle and Astoria, Oregon, plus some employees at the winter shipyard in Seattle.

The length and size of salmon runs vary from year to year, and hence the number of employees needed at each cannery also varies. Estimates are made as early in the winter as possible; the necessary employees are hired, and when the time comes, they are transported to the canneries. Salmon must be processed soon after they are caught, and the work during the canning season is therefore intense.[2] For this reason, and because the canneries are located in remote regions, all workers are housed at the canneries and have their meals in company-owned mess halls.

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[2] "Independent fishermen catch the salmon and turn them over to company-owned boats called 'tenders,' which transport the fish from the fishing grounds to the canneries. Once at the cannery, the fish are eviscerated, the eggs pulled, and they are cleaned. Then, operating at a rate of approximately four cans per second, the salmon are filled into cans. Next, the canned salmon are cooked under precise time-temperature requirements established by the FDA, and the cans are inspected to ensure

Jobs at the canneries are of two general types: "cannery jobs" on the cannery line, which are unskilled positions; and "noncannery jobs," which fall into a variety of classifications. Most noncannery jobs are classified as skilled positions.[3] Cannery jobs are filled predominantly by nonwhites: Filipinos and Alaska Natives. The Filipinos are hired through, and dispatched by, Local 37 of the International Longshoremen's and Warehousemen's Union pursuant to a hiring hall agreement with the local. The Alaska Natives primarily reside in villages near the remote cannery locations. Noncannery jobs are filled with predominantly white workers, who are hired during the winter months from the companies' offices in Washington and Oregon. Virtually all of the noncannery jobs pay more than cannery positions. The predominantly white noncannery workers and the predominantly nonwhite cannery employees live in separate dormitories and eat in separate mess halls.

In 1974, respondents, a class of nonwhite cannery workers who were (or had been) employed at the canneries, brought this Title VII action against petitioners. Respondents alleged that a variety of petitioners' hiring/promotion practices—*e. g.*, nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, a practice of not promoting from within—were responsible for the racial strati-

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that proper seals are maintained on the top, bottom and sides." 768 F. 2d 1120, 1123 (CA9), vacated, 787 F. 2d 462 (1985).

[3] The noncannery jobs were described as follows by the Court of Appeals: "Machinists and engineers are hired to maintain the smooth and continuous operation of the canning equipment. Quality control personnel conduct the FDA-required inspections and recordkeeping. Tenders are staffed with a crew necessary to operate the vessel. A variety of support personnel are employed to operate the entire cannery community, including, for example, cooks, carpenters, store-keepers, bookkeepers, beach gangs for dock yard labor and construction, etc." 768 F. 2d, at 1123.

fication of the work force and had denied them and other nonwhites employment as noncannery workers on the basis of race. Respondents also complained of petitioners' racially segregated housing and dining facilities. All of respondents' claims were advanced under both the disparate-treatment and disparate-impact theories of Title VII liability.

The District Court held a bench trial, after which it entered 172 findings of fact. 34 EPD ¶34,437, pp. 33,822–33,836 (WD Wash. 1983). It then rejected all of respondents' disparate-treatment claims. It also rejected the disparate-impact challenges involving the subjective employment criteria used by petitioners to fill these noncannery positions, on the ground that those criteria were not subject to attack under a disparate-impact theory. *Id.*, p. 33,840. Petitioners' "objective" employment practices (*e. g.*, an English language requirement, alleged nepotism in hiring, failure to post noncannery openings, the rehire preference, etc.) were found to be subject to challenge under the disparate-impact theory, but these claims were rejected for failure of proof. Judgment was entered for petitioners.

On appeal, a panel of the Ninth Circuit affirmed, 768 F. 2d 1120 (1985), but that decision was vacated when the Court of Appeals agreed to hear the case en banc, 787 F. 2d 462 (1985). The en banc hearing was ordered to settle an intracircuit conflict over the question whether subjective hiring practices could be analyzed under a disparate-impact model; the Court of Appeals held—as this Court subsequently ruled in *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977 (1988)—that disparate-impact analysis could be applied to subjective hiring practices. 810 F. 2d 1477, 1482 (1987). The Ninth Circuit also concluded that in such a case, "[o]nce the plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer," *id.*, at 1485, to "prov[e the] business necessity" of the challenged practice, *id.*, at 1486. Because the en banc holding on subjective employment practices reversed the District Court's contrary ruling, the en banc Court of Appeals remanded the case to a panel for further proceedings.

On remand, the panel applied the en banc ruling to the facts of this case. 827 F. 2d 439 (1987). It held that respondents had made out a prima facie case of disparate impact in hiring for both skilled and unskilled noncannery positions. The panel remanded the case for further proceedings, instructing the District Court that it was the employer's burden to prove that any disparate impact caused by its hiring and employment practices was justified by business necessity. Neither the en banc court nor the panel disturbed the District Court's rejection of the disparate-treatment claims.[4]

Petitioners sought review of the Court of Appeals' decision in this Court, challenging it on several grounds. Because some of the issues raised by the decision below were matters on which this Court was evenly divided in *Watson* v. *Fort Worth Bank & Trust*, *supra*, we granted certiorari, 487 U. S. 1264 (1988), for the purpose of addressing these disputed questions of the proper application of Title VII's disparate-impact theory of liability.

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[4] The fact that neither the District Court, nor the Ninth Circuit en banc, nor the subsequent Court of Appeals panel ruled for respondents on their disparate-treatment claims—*i. e.*, their allegations of intentional racial discrimination—warrants particular attention in light of the dissents' comment that the canneries "bear an unsettling resemblance to aspects of a plantation economy." *Post*, at 664, n. 4 (STEVENS, J., dissenting); *post*, at 662 (BLACKMUN, J., dissenting).

Whatever the "resemblance," the unanimous view of the lower courts in this litigation has been that respondents did not prove that the canneries practice intentional racial discrimination. Consequently, JUSTICE BLACKMUN's hyperbolic allegation that our decision in this case indicates that this Court no longer "believes that race discrimination . . . against nonwhites . . . is a problem in our society," *ibid.*, is inapt. Of course, it is unfortunately true that race discrimination exists in our country. That does not mean, however, that it exists at the canneries—or more precisely, that it has been proved to exist at the canneries.

Indeed, JUSTICE STEVENS concedes that respondents did not press before us the legal theories under which the aspects of cannery life that he finds to most resemble a "plantation economy" might be unlawful. *Post*, at 664, n. 4. Thus, the question here is not whether we "approve" of petitioners' employment practices or the society that exists at the canneries, but, rather, whether respondents have properly established that these practices violate Title VII.

II

In holding that respondents had made out a prima facie case of disparate impact, the Court of Appeals relied solely on respondents' statistics showing a high percentage of nonwhite workers in the cannery jobs and a low percentage of such workers in the noncannery positions.[5] Although statistical proof can alone make out a prima facie case, see *Teamsters* v. *United States*, 431 U. S. 324, 339 (1977); *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 307–308 (1977), the Court of Appeals' ruling here misapprehends our precedents and the purposes of Title VII, and we therefore reverse.

"There can be no doubt," as there was when a similar mistaken analysis had been undertaken by the courts below in *Hazelwood*, *supra*, at 308, "that the . . . comparison . . . fundamentally misconceived the role of statistics in employment discrimination cases." The "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market." *Ibid.* It is such a comparison—between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs—that generally forms the proper basis for the initial inquiry in a disparate-impact case. Alternatively, in cases where such labor market statistics will be difficult if not impossible to ascertain, we have recognized that certain other statistics—such as measures indicating the racial composition of "otherwise-qualified applicants" for at-issue jobs—are equally probative for this purpose. See, *e. g.*, *New York City Transit Authority* v. *Beazer*, 440 U. S. 568, 585 (1979).[6]

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[5] The parties dispute the extent to which there is a discrepancy between the percentage of nonwhites employed as cannery workers and those employed in noncannery positions. Compare, *e. g.*, Brief for Petitioners 4–9 with Brief for Respondents 4–6. The District Court made no precise numerical findings in this regard, but simply noted that there were "significant disparities between the at-issue jobs [*i. e.*, noncannery jobs] and the total workforce at the canneries" which were explained by the fact that "nearly all employed in the 'cannery worker' department are non-white." See 34 EPD ¶ 34,437, pp. 33,841, 33,829 (WD Wash. 1983).

For reasons explained below, the degree of disparity between these groups is not relevant to our decision here.

It is clear to us that the Court of Appeals' acceptance of the comparison between the racial composition of the cannery work force and that of the noncannery work force, as probative of a prima facie case of disparate impact in the selection of the latter group of workers, was flawed for several reasons. Most obviously, with respect to the skilled noncannery jobs at issue here, the cannery work force in no way reflected "the pool of *qualified* job applicants" or the "*qualified* population in the labor force." Measuring alleged discrimination in the selection of accountants, managers, boat captains, electricians, doctors, and engineers—and the long list of other "skilled" noncannery positions found to exist by the District Court, see 34 EPD ¶34,437, p. 33,832—by comparing the number of nonwhites occupying these jobs to the number of nonwhites filling cannery worker positions is nonsensical. If the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault),[7] petitioners' selection methods or employment practices cannot be said to have had a "disparate impact" on nonwhites.

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[6] In fact, where "figures for the general population might . . . accurately reflect the pool of qualified job applicants," cf. *Teamsters* v. *United States*, 431 U. S. 324, 340, n. 20 (1977), we have even permitted plaintiffs to rest their prima facie cases on such statistics as well. See, *e. g.*, *Dothard* v. *Rawlinson*, 433 U. S. 321, 329–330 (1977).

[7] Obviously, the analysis would be different if it were found that the dearth of qualified nonwhite applicants was due to practices on petitioners' part which—expressly or implicitly—deterred minority group members from applying for noncannery positions. See, *e. g.*, *Teamsters* v. *United States*, *supra*, at 365.

One example illustrates why this must be so. Respondents' own statistics concerning the noncannery work force at one of the canneries at issue here indicate that approximately 17% of the new hires for medical jobs, and 15% of the new hires for officer worker positions, were nonwhite. See App. to Brief for Respondents B–1. If it were the case that less than 15 to 17% of the applicants for these jobs were nonwhite and that nonwhites made up a lower percentage of the relevant qualified labor market, it is hard to see how respondents, without more, cf. *Connecticut* v. *Teal*, 457 U. S. 440 (1982), would have made out a prima facie case of disparate impact. Yet, under the Court of Appeals' theory, simply because nonwhites comprise 52% of the cannery workers at the cannery in question, see App. to Brief for Respondents B–1, respondents would be successful in establishing a prima facie case of racial discrimination under Title VII.

Such a result cannot be squared with our cases or with the goals behind the statute. The Court of Appeals' theory, at the very least, would mean that any employer who had a segment of his work force that was—for some reason—racially imbalanced, could be haled into court and forced to engage in the expensive and time-consuming task of defending the "business necessity" of the methods used to select the other members of his work force. The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII. See 42 U. S. C. § 2000e–2(j); see also *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. at 922–994, and n. 2 (opinion of O'CONNOR, J.). The Court of Appeals' theory would "leave the employer little choice . . . but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII." *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 449 (1975) (BLACKMUN, J., concurring in judgment).

The Court of Appeals also erred with respect to the unskilled noncannery positions. Racial imbalance in one segment of an employer's work force does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions, even where workers for the different positions may have somewhat fungible skills (as is arguably the case for cannery and unskilled noncannery workers). As long as there are no barriers or practices deterring qualified nonwhites from applying for noncannery positions, see n. 6, *supra*, if the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, the employer's selection mechanism probably does not operate with a disparate impact on minorities.[8] Where this is the case, the percentage of nonwhite workers found in other positions in the employer's labor force is irrelevant to the question of a prima facie statistical case of disparate impact. As noted above, a contrary ruling on this point would almost inexorably lead to the use of numerical quotas in the workplace, a result that Congress and this Court have rejected repeatedly in the past.

Moreover, isolating the cannery workers as the potential "labor force" for unskilled noncannery positions is at once both too broad and too narrow in its focus. It is too broad because the vast majority of these cannery workers did not seek jobs in unskilled noncannery positions; there is no showing that many of them would have done so even if none of the arguably "deterring" practices existed. Thus, the pool of cannery workers cannot be used as a surrogate for the class of qualified job applicants because it contains many persons who have not (and would not) be noncannery job applicants. Conversely, if respondents propose to use the cannery workers for comparison purposes because they represent the "qualified labor population" generally, the group is too narrow because there are obviously many qualified persons in the labor market for noncannery jobs who are not cannery workers.

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[8] We qualify this conclusion—observing that it is only "probable" that there has been no disparate impact on minorities in such circumstances—because bottom-line racial balance is not a defense under Title VII. See *Connecticut* v. *Teal*, 457 U. S. 440 (1982). Thus, even if petitioners could show that the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, respondents would still have a case under Title VII, if they could prove that some particular hiring practice has a disparate impact on minorities, notwithstanding the bottom-line racial balance in petitioners' work force. See *Teal*, *supra*, at 450.

The peculiar facts of this case further illustrate why a comparison between the percentage of nonwhite cannery workers and nonwhite noncannery workers is an improper basis for making out a claim of disparate impact. Here, the District Court found that nonwhites were "overrepresent[ed]" among cannery workers because petitioners had contracted with a predominantly nonwhite union (local 37) to fill these positions. See 34 EPD ¶33,437, p. 33,829. As a result, if petitioners (for some permissible reason) ceased using local 37 as its hiring channel for cannery positions, it appears (according to the District Court's findings) that the racial stratification between the cannery and noncannery workers might diminish to statistical insignificance. Under the Court of Appeals' approach, therefore, it is possible that *with no change whatsoever* in their hiring practices for noncannery workers—the jobs at issue in this lawsuit—petitioners could make respondents' prima facie case of disparate impact "disappear." But *if* there would be no prima facie case of disparate impact in the selection of noncannery workers absent petitioners' use of local 37 to hire cannery workers, surely petitioners' reliance on the union to fill the cannery jobs not at issue here (and its resulting "overrepresentation" of nonwhites in those positions) does not—standing alone—make out a prima facie case of disparate impact. Yet it is precisely such an ironic result that the Court of Appeals reached below.

Consequently, we reverse the Court of Appeals' ruling that a comparison between the percentage of cannery workers who are nonwhite and the percentage of noncannery workers who are nonwhite makes out a prima facie case of disparate impact. Of course, this leaves unresolved whether the record made in the District Court will support a conclusion that a prima facie case of disparate impact has been established on some basis other than the racial disparity between cannery and noncannery workers. This is an issue that the Court of Appeals or the District Court should address in the first instance.

III

Since the statistical disparity relied on by the Court of Appeals did not suffice to make out a prima facie case, any inquiry by us into whether the specific challenged employment practices of petitioners caused that disparity is pretermitted, as is any inquiry into whether the disparate impact that any employment practice may have had was justified by business considerations.[9] Because we remand for further proceedings, however, on whether a prima facie case of disparate impact has been made in defensible fashion in this case, we address two other challenges petitioners have made to the decision of the Court of Appeals.

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[9] As we understand the opinions below, the specific employment practices were challenged only insofar as they were claimed to have been responsible for the overall disparity between the number of minority cannery and noncannery workers. The Court of Appeals did not purport to hold that any specified employment practice produced its own disparate impact that was actionable under Title VII. This is not to say that a specific practice, such as nepotism, if it were proved to exist, could not itself be subject to challenge if it had a disparate impact on minorities. Nor is it to say that segregated dormitories and eating facilities in the workplace may not be challenged under 42 U. S. C. § 2000e–2(a)(2) without showing a disparate impact on hiring or promotion.

A

First is the question of causation in a disparate-impact case. The law in this respect was correctly stated by JUSTICE O'CONNOR's opinion last Term in *Watson* v. *Fort Worth Bank & Trust*, 487 U. S., at 994:

> "[W]e note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged. . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."

Cf. also *id.*, at 1000 (BLACKMUN, J., concurring in part and concurring in judgment).

Indeed, even the Court of Appeals—whose decision petitioners assault on this score—noted that "it is . . . essential that the practices identified by the cannery workers be linked causally with the demonstrated adverse impact." 827 F. 2d, at 445. Notwithstanding the Court of Appeals' apparent adherence to the proper inquiry, petitioners contend that that court erred by permitting respondents to make out their case by offering "only [one] set of cumulative comparative statistics as evidence of the disparate impact of each and all of [petitioners' hiring] practices." Brief for Petitioners 31.

Our disparate-impact cases have always focused on the impact of *particular* hiring practices on employment opportunities for minorities. Just as an employer cannot escape liability under Title VII by demonstrating that, "at the bottom line," his work force is racially balanced (where particular hiring practices may operate to deprive minorities of employment opportunities), see *Connecticut* v. *Teal*, 457 U. S., at

450, a Title VII plaintiff does not make out a case of disparate impact simply by showing that, "at the bottom line," there is racial *imbalance* in the work force. As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case in a disparate-impact suit under Title VII.

Here, respondents have alleged that several "objective" employment practices (*e. g.*, nepotism, separate hiring channels, rehire preferences), as well as the use of "subjective decision making" to select noncannery workers, have had a disparate impact on nonwhites. Respondents base this claim on statistics that allegedly show a disproportionately low percentage of nonwhites in the at-issue positions. However, even if on remand respondents can show that nonwhites are underrepresented in the at-issue jobs in a manner that is acceptable under the standards set forth in Part II, *supra*, this alone will *not* suffice to make out a prima facie case of disparate impact. Respondents will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites. To hold otherwise would result in employers being potentially liable for "the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Watson* v. *Fort Worth Bank & Trust*, *supra*, at 992.

Some will complain that this specific causation requirement is unduly burdensome on Title VII plaintiffs. But liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims. Also, employers falling within the scope of the Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.1 *et seq.* (1988), are required to "maintain . . . records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group[s]." See § 1607.4(A). This includes records concerning "the individual components of the selection process" where there is a significant disparity in the selection rates of whites and nonwhites. See § 1607.4(C). Plaintiffs as a general matter will have the benefit of these tools to meet their burden of showing a causal link between challenged employment practices and racial imbalances in the work force; respondents presumably took full advantage of these opportunities to build their case before the trial in the District Court was held.[10]

Consequently, on remand, the courts below are instructed to require, as part of respondents' prima facie case, a demonstration that specific elements of the petitioners' hiring process have a significantly disparate impact on nonwhites.

B

If, on remand, respondents meet the proof burdens outlined above, and establish a prima facie case of disparate impact with respect to any of petitioners' employment practices, the case will shift to any business justification petitioners offer for their use of these practices. This phase of the disparate-impact case contains two components: first, a consideration of the justifications an employer offers for his use of these practices; and second, the availability of alternative practices to achieve the same business ends, with less racial impact. See, *e. g.*, *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 425. We consider these two components in turn.

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[10] Of course, petitioners' obligation to collect or retain any of these data may be limited by the Guidelines themselves. See 29 CFR § 1602.14(b) (1988) (exempting "seasonal" jobs from certain recordkeeping requirements).

(1)

Though we have phrased the query differently in different cases, it is generally well established that at the justification stage of such a disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. See, *e. g.*, *Watson* v. *Fort Worth Bank & Trust*, 487 U. S., at 997–999; *New York City Transit Authority* v. *Beazer*, 440 U. S., at 587, n. 31; *Griggs* v. *Duke Power Co.*, 401 U. S., at 432. The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils we have identified above. See *supra*, at 652–653.

In this phase, the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff. To the extent that the Ninth Circuit held otherwise in its en banc decision in this case, see 810 F. 2d, at 1485–1486, or in the panel's decision on remand, see 827 F. 2d, at 445, 447—suggesting that the persuasion burden should shift to petitioners once respondents established a prima facie case of disparate impact—its decisions were erroneous. "[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff *at all times*." *Watson*, *supra*, at 997 (O'CONNOR, J.) (emphasis added). This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts, see Fed. Rule Evid. 301, and more specifically, it conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 256–258 (1981). We acknowledge that some of our earlier decisions can be read as suggesting otherwise. See *Watson*, *supra*, at 1006–1008 (BLACKMUN, J., concurring in part and concurring in judgment). But to the extent that those cases speak of an employer's "burden of proof" with respect to a legitimate business justification defense, see, *e. g.*, *Dothard* v. *Rawlinson*, 433 U. S. 321, 329 (1977), they should have been understood to mean an employer's production—but not persuasion—burden. Cf., *e. g.*, *NLRB* v. *Transportation Management Corp.*, 462 U. S. 393, 404, n. 7 (1983). The persuasion burden here must remain with the plaintiff, for it is he who must prove that it was "because of such individual's race, color," etc., that he was denied a desired employment opportunity. See 42 U. S. C. § 2000e–2(a).

(2)

Finally, if on remand the case reaches this point, and respondents cannot persuade the trier of fact on the question of petitioners' business necessity defense, respondents may still be able to prevail. To do so, respondents will have to persuade the factfinder that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s]"; by so demonstrating, respondents would prove that "[petitioners were] using [their] tests merely as a 'pretext' for discrimination." *Albemarle Paper Co.*, *supra*, at 425; see also *Watson*, 487 U. S., at 998 (O'CONNOR, J.); *id.*, at 1005–1006 (BLACKMUN, J., concurring in part and concurring in judgment). If respondents, having established a prima facie case, come forward with alternatives to petitioners' hiring practices that reduce the racially disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons.

Of course, any alternative practices which respondents offer up in this respect must be equally effective as petitioners' chosen hiring procedures in achieving petitioners' legitimate employment goals. Moreover, "[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals." *Watson, supra,* at 998 (O'CONNOR, J.). "Courts are generally less competent than employers to restructure business practices," *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 578 (1978); consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternative selection or hiring practice in response to a Title VII suit.

IV

For the reasons given above, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

I fully concur in JUSTICE STEVENS' analysis of this case. Today a bare majority of the Court takes three major strides backwards in the battle against race discrimination. It reaches out to make last Term's plurality opinion in *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977 (1988), the law, thereby upsetting the longstanding distribution of burdens of proof in Title VII disparate-impact cases. It bars the use of internal work force comparisons in the making of a prima facie case of discrimination, even where the structure of the industry in question renders any other statistical comparison meaningless. And it requires practice-by-practice statistical proof of causation, even where, as here, such proof would be impossible.

The harshness of these results is well demonstrated by the facts of this case. The salmon industry as described by this record takes us back to a kind of overt and institutionalized discrimination we have not dealt with in years: a total residential and work environment organized on principles of racial stratification and segregation, which, as JUSTICE STEVENS points out, resembles a plantation economy. *Post*, at 664, n. 4. This industry long has been characterized by a taste for discrimination of the old-fashioned sort: a preference for hiring nonwhites to fill its lowest level positions, on the condition that they stay there. The majority's legal rulings essentially immunize these practices from attack under a Title VII disparate-impact analysis.

Sadly, this comes as no surprise. One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was. Cf. *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989).

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

Fully 18 years ago, this Court unanimously held that Title VII of the Civil Rights Act of 1964[1] prohibits employment practices that have discriminatory effects as well as those that are intended to discriminate. *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). Federal courts and agencies consistently have enforced that interpretation, thus promoting our national goal of eliminating barriers that define economic opportunity not by aptitude and ability but by race, color, national origin, and other traits that are easily identified but utterly irrelevant to one's qualification for a particular job.[2] Regrettably, the Court retreats from these efforts in its review of an interlocutory judgment respecting the "peculiar facts" of this lawsuit.[3] Turning a blind eye to the meaning and purpose of Title VII, the majority's opinion perfunctorily rejects a longstanding rule of law and underestimates the probative value of evidence of a racially stratified work force.[4] I cannot join this latest sojourn into judicial activism.

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[1] 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*

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[2] Title VII also bars discrimination because of religion or sex. 42 U. S. C. § 2000e–2(a). Discrimination based on other characteristics has been challenged under other statutes. See, *e. g., School Board of Nassau County* v. *Arline*, 480 U. S. 273 (1987) (determining scope of protection for handicapped schoolteacher under § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U. S. C. § 794); *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669 (1983) (Pregnancy Discrimination Act of 1978, Pub. L. 95–555, § 1, 92 Stat. 2076, 42 U. S. C. § 2000e–(k)); *Lorillard* v. *Pons*, 434 U. S. 575 (1978) (Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.*); *Corning Glass Works* v. *Brennan*, 417 U. S. 188 (1974) (Equal Pay Act of 1963, 77 Stat. 56, § 3, enacted as § 6(d) of the Fair Labor Standards Act of 1938, 29 U. S. C. § 206(d)).

[3] See *ante*, at 654. The majority purports to reverse the Court of Appeals but in fact directs the District Court to make additional findings, some of which had already been ordered by the Court of Appeals. Compare 827 F. 2d 439, 445 (CA9 1987), with *ante*, at 657–658. Furthermore, nearly half the majority's opinion is devoted to two questions not fairly raised at this point: "the question of causation in a disparate-impact case," *ante*, at 656, and the nature of the employer's defense, *ante*, at 658. Because I perceive no urgency to decide "these disputed questions," *ante*, at 650, at an interlocutory stage of such a factually complicated case, I believe the Court should have denied certiorari and allowed the District Court to make the additional findings directed by the Court of Appeals.

[4] Respondents constitute a class of present and former employees of petitioners, two Alaskan salmon canning companies. The class members, described by the parties as "nonwhite," include persons of Samoan, Chinese, Filipino, Japanese, and Alaska Native descent, all but one of whom are United States citizens. 34 EPD ¶ 34,437, pp. 33,822, 33,836–33,838 (WD Wash. 1983). Fifteen years ago they commenced this suit, alleging that petitioners engage in hiring, job assignment, housing, and messing

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I would have thought it superfluous to recount at this late date the development of our Title VII jurisprudence, but the majority's facile treatment of settled law necessitates such a primer. This Court initially considered the meaning of Title VII in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), in which a class of utility company employees challenged the conditioning of entry into higher paying jobs upon a high school education or passage of two written tests. Despite evidence that "these two requirements operated to render ineligible a markedly disproportionate number of Negroes,"[5] the Court of Appeals had held that be-

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practices that segregate nonwhites from whites in violation of Title VII. Evidence included this response in 1971 by a foreman to a college student's inquiry about cannery employment:

"'We are not in a position to take many young fellows to our Bristol Bay canneries as they do not have the background for our type of employees. Our cannery labor is either Eskimo or Filipino and we do not have the facilities to mix others with these groups.'" *Id.*, at 33,836.

Some characteristics of the Alaska salmon industry described in this litigation—in particular, the segregation of housing and dining facilities and the stratification of jobs along racial and ethnic lines—bear an unsettling resemblance to aspects of a plantation economy. See generally Plantation, Town, and County, Essays on the Local History of American Slave Society 163–334 (E. Miller & E. Genovese eds. 1974). Indeed the maintenance of inferior, segregated facilities for housing and feeding nonwhite employees, see 34 EPD ¶ 34,437, pp. 33,836, 33,843–33,844, strikes me as a form of discrimination that, although it does not necessarily fit neatly into a disparate-impact or disparate-treatment mold, nonetheless violates Title VII. See generally Brief for National Association for the Advancement of Colored People as *Amicus Curiae*. Respondents, however, do not press this theory before us.

[5] This Court noted that census statistics showed that in the employer's State, North Carolina, "while 34% of white males had completed high school, only 12% of Negro males had done so. . . . Similarly, with respect to standardized tests, the EEOC in one case found that use of a battery of tests, including the Wonderlic and Bennett tests used by the Company in the instant case, resulted in 58% of whites passing the tests, as compared with only 6% of the blacks." *Griggs*, 401 U. S., at 430, n. 6.

cause there was no showing of an intent to discriminate on account of race, there was no Title VII violation. *Id.*, at 429. Chief Justice Burger's landmark opinion established that an employer may violate the statute even when acting in complete good faith without any invidious intent.[6] Focusing on § 703(a)(2),[7] he explained:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U. S., at 429–430.

The opinion in *Griggs* made it clear that a neutral practice that operates to exclude minorities is nevertheless lawful if it serves a valid business purpose. "The touchstone is business necessity," the Court stressed. *Id.*, at 431. Because "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation[,] . . . Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[8] *Id.*, at 432 (emphasis in original). Congress has declined to act—as the Court now sees fit—to limit the reach of this "disparate-impact" theory, see *Teamsters* v. *United States*, 431 U. S. 324, 335, n. 15 (1977); indeed it has extended its application.[9] This approval lends added force to the *Griggs* holding.

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[6] "The Court of Appeals held that the Company had adopted the diploma and test requirements without any 'intention to discriminate against Negro employees.' We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but *good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.*" *Id.*, at 432 (emphasis added) (citation omitted).

[7] See *id.*, at 426, n. 1. This subsection provides that "[i]t shall be an unlawful employment practice for an employer—

"(a) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a)(2).

The *Griggs* framework, with its focus on ostensibly neutral qualification standards, proved inapposite for analyzing an individual employee's claim, brought under § 703(a)(1),[10] that an employer intentionally discriminated on account of race.[11]

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[8] The opinion concluded:

"Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. *What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.*" 401 U. S., at 436 (emphasis added).

[9] Voting Rights Act Amendments of 1982, Pub. L. 97-205, 96 Stat. 131, 134, as amended, codified at 42 U. S. C. §§ 1973, 1973b (1982 ed. and Supp. V). Legislative Reports leading to 1972 amendments to Title VII also evince support for disparate-impact analysis. H. R. Rep. No. 92-238, pp. 8, 20-22 (1971); S. Rep. No. 92-415, p. 5, and n. 1 (1971); accord, *Connecticut* v. *Teal*, 457 U. S. 440, 447, n. 8 (1982). Moreover, the theory is employed to enforce fair housing and age discrimination statutes. See Note, Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act, 54 Ford. L. Rev. 563 (1986); Note, Disparate Impact Analysis and the Age Discrimination in Employment Act, 68 Minn. L. Rev. 1038 (1984).

[10] This subsection makes it unlawful for an employer

"to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U. S. C. § 2000e-2(a)(1).

[11] In *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), Justice Powell explained:

The means for determining intent absent direct evidence was outlined in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), and *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981), two opinions written by Justice Powell for unanimous Courts. In such a "disparate-treatment" case, see *Teamsters*, 431 U. S., at 335, n. 15, the plaintiff's initial burden, which is "not onerous," 450 U. S., at 253, is to establish "a prima facie case of racial discrimination," 411 U. S., at 802; that is, to create a presumption of unlawful discrimination by "eliminat[ing] the most common nondiscriminatory reasons for the plaintiff's rejection."[12] 450 U. S., at 254. "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 U. S., at 802; see 450 U. S., at 254. Fi-

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"*Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. Respondent, however, appears in different clothing. He had engaged in a seriously disruptive act against the very one from whom he now seeks employment. And petitioner does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected respondent for unlawful conduct against it and, in the absence of proof of pretext or discriminatory application of such a reason, this cannot be thought the kind of 'artificial, arbitrary, and unnecessary barriers to employment' which the Court found to be the intention of Congress to remove." *Id.*, at 806 (citations omitted).

[12] "This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.*, at 802.

nally, because "Title VII does not . . . permit [the employer] to use [the employee's] conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1)," the employee "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." 411 U. S., at 804–805; see 450 U. S., at 256. While the burdens of producing evidence thus shift, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[13] 450 U. S., at 253.

Decisions of this Court and other federal courts repeatedly have recognized that while the employer's burden in a disparate-treatment case is simply one of coming forward with evidence of legitimate business purpose, its burden in a disparate-impact case is proof of an affirmative defense of business necessity.[14] Although the majority's opinion blurs that distinction, thoughtful reflection on common-law pleading principles clarifies the fundamental differences between the two types of "burdens of proof."[15] In the ordinary civil trial, the plaintiff bears the burden of persuading the trier of fact that the defendant has harmed her. See, *e. g.*, 2 Restatement (Second) of Torts §§ 328 A, 433 B (1965) (hereinafter Restatement). The defendant may undercut plaintiff's efforts both by confronting plaintiff's evidence during her case in chief and by submitting countervailing evidence during its own case.[16] But if the plaintiff proves the existence of the harmful act, the defendant can escape liability only by persuading the factfinder that the act was justified or excusable. See, *e. g.*, Restatement §§ 454–461, 463–467. The plaintiff in turn may try to refute this affirmative defense. Although the burdens of producing evidence regarding the existence of harm or excuse thus shift between the plaintiff

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[13] Although disparate impact and disparate treatment are the most prevalent modes of proving discrimination violative of Title VII, they are by no means exclusive. See generally B. Schlei & P. Grossman, Employment Discrimination Law 13–289 (2d ed. 1983) (four chapters discussing "disparate treatment," "present effects of past discrimination," "adverse impact," and "reasonable accommodation" as "categories" of discrimination). Cf. n. 4, *supra*. Moreover, either or both of the primary theories may be applied to a particular set of facts. See *Teamsters* v. *United States*, 431 U. S. 324, 336, n. 15 (1977).

[14] See *McDonnell Douglas*, 411 U. S., at 802, n. 14. See also, *e. g.*, *Teal*, 457 U. S., at 446 ("employer must . . . demonstrate that 'any given requirement [has] a manifest relationship to the employment in question'"); *New York City Transit Authority* v. *Beazer*, 440 U. S. 568, 587 (1979) (employer "rebutted" prima facie case by "demonstration that its narcotics rule . . . 'is job related'"); *Dothard* v. *Rawlinson*, 433 U. S. 321, 329 (1977) (employer has to "prov[e] that the challenged requirements are job related"); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 425 (1975) (employer has "burden of proving that its tests are 'job related'"); *Griggs*, 401 U. S., at 432 (employer has "burden of showing that any given requirement must have a manifest relationship to the employment"). Court of Appeals opinions properly treating the employer's burden include *Bunch* v. *Bullard*, 795 F. 2d 384, 393–394 (CA5 1986); *Lewis* v. *Bloomsburg Mills*,

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Inc., 773 F. 2d 561, 572 (CA4 1985); *Nash* v. *Jacksonville*, 763 F. 2d 1393, 1397 (CA11 1985); *Segar* v. *Smith*, 238 U. S. App. D. C. 103, 121, 738 F. 2d 1249, 1267 (1984), cert. denied *sub nom. Meese* v. *Segar*, 471 U. S. 1115 (1985); *Moore* v. *Hughes Helicopters, Inc., Div. of Summa Corp.*, 708 F. 2d 475, 481 (CA9 1983); *Hawkins* v. *Anheuser-Busch, Inc.*, 697 F. 2d 810, 815 (CA8 1983); *Johnson* v. *Uncle Ben's, Inc.*, 657 F. 2d 750 (CA5 1981), cert. denied, 459 U. S. 967 (1982); contra, *Croker* v. *Boeing Co.*, 662 F. 2d 975, 991 (CA3 1981) (en banc). Cf. Equal Employment Opportunity Comm'n, Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.1 *et seq.* (1988).

[15] See, *e. g.*, 9 J. Wigmore, Evidence §§ 2485–2498 (J. Chadbourn rev. 1981); D. Louisell & C. Mueller, Federal Evidence §§ 65–70 (1977) (hereinafter Louisell); 21 C. Wright & K. Graham, Federal Practice and Procedure § 5122 (1977) (hereinafter Wright); J. Thayer, A Preliminary Treatise on Evidence 353–389 (1898) (hereinafter Thayer); C. Langdell, Equity Pleading 108–115 (2d ed. 1883).

[16] Cf. Thayer 357 (quoting *Caldwell* v. *New Jersey S. B. Co.*, 47 N. Y. 282, 290 (1872)) ("'The burden of maintaining the affirmative of the issue, and, properly speaking, the burden of proof, remained upon the plaintiff throughout the trial; but the burden or necessity was cast upon the defendant, to relieve itself from the presumption of negligence raised by the plantiff's evidence'").

and the defendant, the burden of proving either proposition remains throughout on the party asserting it.

In a disparate-treatment case there is no "discrimination" within the meaning of Title VII unless the employer intentionally treated the employee unfairly because of race. Therefore, the employee retains the burden of proving the existence of intent at all times. If there is direct evidence of intent, the employee may have little difficulty persuading the factfinder that discrimination has occurred. But in the likelier event that intent has to be established by inference, the employee may resort to the *McDonnell/Burdine* inquiry. In either instance, the employer may undermine the employee's evidence but has no independent burden of persuasion.

In contrast, intent plays no role in the disparate-impact inquiry. The question, rather, is whether an employment practice has a significant, adverse effect on an identifiable class of workers—regardless of the cause or motive for the practice. The employer may attempt to contradict the factual basis for this effect; that is, to prevent the employee from establishing a prima facie case. But when an employer is faced with sufficient proof of disparate impact, its only recourse is to justify the practice by explaining why it is necessary to the operation of business. Such a justification is a classic example of an affirmative defense.[17]

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[17] Accord, Fed. Rule Civ. Proc. 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense"). Cf. Thayer 368–369:

"An admission may, of course, end the controversy; but such an admission may be, and yet not end it; and if that be so, it is because the party making the admission sets up something that avoids the apparent effect of it . . . . When this happens, the party defending becomes, in so far, the *actor* or plaintiff. In general, he who seeks to move a court in his favor, whether as an original plaintiff whose facts are merely denied, or as a defendant, who, in admitting his adversary's contention and setting up an affirmative defence, takes the rôle of *actor (reus excipiendo fit actor)*,—must satisfy

Failing to explore the interplay between these distinct orders of proof, the Court announces that our frequent statements that the employer shoulders the burden of proof respecting business necessity "should have been understood to mean an employer's production—but not persuasion—burden."[18] *Ante*, at 660. Our opinions always have emphasized that in a disparate-impact case the employer's burden is weighty. "The touchstone," the Court said in *Griggs*, "is business necessity." 401 U. S., at 431. Later, we held that prison administrators had failed to "rebu[t] the prima facie case of discrimination by showing that the height and weight requirements are . . . essential to effective job performance," *Dothard* v. *Rawlinson*, 433 U. S. 321, 331 (1977). Cf. n. 14, *supra*. I am thus astonished to read that the "touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. . . . [T]here is no requirement that the challenged practice be . . . 'essential,'" *ante*, at 659. This casual—almost summary—rejec-

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the court of the truth and adequacy of the grounds of his claim, both in point of fact and law."

Similarly, in suits alleging price discrimination in violation of § 2 of the Clayton Act, as amended by the Robinson Patman Act, 15 U. S. C. § 13, it is well settled that the defendant has the burden of affirmatively establishing as a defense either a cost justification, under the proviso to subsection (a), *United States* v. *Borden Co.*, 370 U. S. 460, 467 (1962), or a good-faith effort to meet a competitor's equally low price, pursuant to subsection (b), *Standard Oil Co.* v. *FTC*, 340 U. S. 231, 250 (1951).

[18] The majority's only basis for this proposition is the plurality opinion in *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 997 (1988), which in turn cites no authority. As JUSTICE BLACKMUN explained in *Watson*, *id.*, at 1001–1002 (concurring in part and concurring in judgment), and as I have shown here, the assertion profoundly misapprehends the difference between disparate-impact and disparate-treatment claims.

The Court also makes passing reference to Federal Rule of Evidence 301. *Ante*, at 660. That Rule pertains only to shifting of evidentiary burdens upon establishment of a presumption and has no bearing on the substantive burdens of proof. See Louisell §§ 65–70; Wright § 5122.

tion of the statutory construction that developed in the wake of *Griggs* is most disturbing. I have always believed that the *Griggs* opinion correctly reflected the intent of the Congress that enacted Title VII. Even if I were not so persuaded, I could not join a rejection of a consistent interpretation of a federal statute. Congress frequently revisits this statutory scheme and can readily correct our mistakes if we misread its meaning. *Johnson* v. *Transportation Agency, Santa Clara Cty.*, 480 U. S. 616, 644 (1987) (STEVENS, J., concurring); *Runyon* v. *McCrary*, 427 U. S. 160, 190–192 (1976) (STEVENS, J., concurring). See *McNally* v. *United States*, 483 U. S. 350, 376 (1987) (STEVENS, J., dissenting); *Commissioner* v. *Fink*, 483 U. S. 89, 102–105 (1987) (STEVENS, J., dissenting); see also *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 486 (1989) (STEVENS, J., dissenting).

Also troubling is the Court's apparent redefinition of the employees' burden of proof in a disparate-impact case. No prima facie case will be made, it declares, unless the employees "'isolat[e] and identif[y] the specific employment practices that are allegedly responsible for any observed statistical disparities.'" *Ante*, at 656 (quoting *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 994 (1988) (plurality opinion)). This additional proof requirement is unwarranted.[19] It is elementary that a plaintiff cannot recover upon proof of injury alone; rather, the plaintiff must connect the injury to an act of the defendant in order to establish prima facie that the defendant is liable. *E. g.*, Restatement § 430. Although the causal link must have substance, the act need not constitute the sole or primary cause of the harm. §§431–433; cf. *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989). Thus in a disparate-impact case, proof of numerous questionable employment practices ought to fortify an employee's assertion that the practices caused racial disparities.[20] Ordinary principles of fairness require that Title VII actions be tried like "any lawsuit." Cf. *U. S. Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 714, n. 3 (1983). The changes the majority makes today, tipping the scales in favor of employers, are not faithful to those principles.

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[19] The Solicitor General's brief *amicus curiae* on behalf of the employers agrees:

"[A] decision rule for selection may be complex: it may, for example, involve consideration of multiple factors. And certainly if the factors combine to produce a single ultimate selection decision and it is not possible to challenge each one, that decision may be challenged (and defended) as a whole." Brief for United States as *Amicus Curiae* 22 (footnote omitted).

II

Petitioners seek reversal of the Court of Appeals and dismissal of this suit on the ground that respondents' statistical evidence failed to prove a prima facie case of discrimination. Brief for Petitioners 48. The District Court concluded "there were 'significant disparities'" between the racial composition of the cannery workers and the noncannery workers, but it "made no precise numerical findings" on this and other critical points. See *ante*, at 650, n. 5. Given this dearth of findings and the Court's newly articulated preference for individualized proof of causation, it would be manifestly unfair to consider respondents' evidence in the aggregate and deem it insufficient. Thus the Court properly rejects petitioners' request for a final judgment and remands for further determination of the strength of respondents' prima facie case. See *ante*, at 655. Even at this juncture, however, I believe that respondents' evidence deserves greater credit than the majority allows.

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[20] The Court discounts the difficulty its causality requirement presents for employees, reasoning that they may employ "liberal civil discovery rules" to obtain the employer's statistical personnel records. *Ante*, at 657. Even assuming that this generally is true, it has no bearing in this litigation, since it is undisputed that petitioners did not preserve such records. Brief for Respondents 42–43; Reply Brief for Petitioners 18–19.

Statistical evidence of discrimination should compare the racial composition of employees in disputed jobs to that "'of the qualified . . . population in the relevant labor market.'" *Ante*, at 650 (quoting *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 308 (1977)). That statement leaves open the definition of the qualified population and the relevant labor market. Our previous opinions, *e. g.*, *New York City Transit Authority* v. *Beazer*, 440 U. S. 568, 584–586 (1979); *Dothard* v. *Rawlinson*, 433 U. S., at 329–330; *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 425 (1975); *Griggs*, 401 U. S., at 426, 430, n. 6, demonstrate that in reviewing statistical evidence, a court should not strive for numerical exactitude at the expense of the needs of the particular case.

The District Court's findings of fact depict a unique industry. Canneries often are located in remote, sparsely populated areas of Alaska. 34 EPD ¶34,437, p. 33,825 (WD Wash. 1983). Most jobs are seasonal, with the season's length and the canneries' personnel needs varying not just year to year but day to day. *Ibid.* To fill their employment requirements, petitioners must recruit and transport many cannery workers and noncannery workers from States in the Pacific Northwest. *Id.*, at 33,828. Most cannery workers come from a union local based outside Alaska or from Native villages near the canneries. *Ibid.* Employees in the noncannery positions—the positions that are "at issue"—learn of openings by word of mouth; the jobs seldom are posted or advertised, and there is no promotion to noncannery jobs from within the cannery workers' ranks. *Id.*, at 33,827–33,828.

In general, the District Court found the at-issue jobs to require "skills," ranging from English literacy, typing, and "ability to use seam micrometers, gauges, and mechanic's hand tools" to "good health" and a driver's license.[21] *Id.*, at

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[21] The District Court found that of more than 100 at-issue job titles, all were skilled except these 15: kitchen help, waiter/waitress, janitor, oil dock crew, night watchman, tallyman, laundry, gasman, roustabout, store help,

33,833–33,834. All cannery workers' jobs, like a handful of at-issue positions, are unskilled, and the court found that the intensity of the work during canning season precludes on-the-job training for skilled noncannery positions. *Id.*, at 33,825. It made no findings regarding the extent to which the cannery workers already are qualified for at-issue jobs: individual plaintiffs testified persuasively that they were fully qualified for such jobs,[22] but the court neither credited nor discredited this testimony. Although there are no findings concerning wage differentials, the parties seem to agree that wages for cannery workers are lower than those for noncannery workers, skilled or unskilled. The District Court found that "nearly all" cannery workers are nonwhite, while the percentage of nonwhites employed in the entire Alaska salmon canning industry "has stabilized at about 47% to 50%." *Id.*, at 33,829. The precise stratification of the work force is not described in the findings, but the parties seem to agree that the noncannery jobs are predominantly held by whites.

Petitioners contend that the relevant labor market in this case is the general population of the "'external' labor market for the jobs at issue." Brief for Petitioners 17. While they would rely on the District Court's findings in this regard, those findings are ambiguous. At one point the District Court specifies "Alaska, the Pacific Northwest, and California" as "the geographical region from which [petitioners] draw their employees," but its next finding refers to "this relevant geographical area for cannery worker, laborer, and other nonskilled jobs," 34 EPD ¶34,437, p. 33,828. There

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stockroom help, assistant caretaker (winter watchman and watchman's assistant), machinist helper/trainee, deckhand, and apprentice carpenter/carpenter's helper. 34 EPD ¶34,437, p. 33,835.

[22] Some cannery workers later became architects, an Air Force officer, and a graduate student in public administration. Some had college training at the time they were employed in the canneries. See *id.*, at 33,837–33,838; App. 38, 52–53; Tr. 76, 951–952, 1036, 1050, 2214.

is no express finding of the relevant labor market for noncannery jobs.

Even assuming that the District Court properly defined the relevant geographical area, its apparent assumption that the population in that area constituted the "available labor supply," *ibid.*, is not adequately founded. An undisputed requirement for employment either as a cannery or noncannery worker is availability for seasonal employment in the far reaches of Alaska. Many noncannery workers, furthermore, must be available for preseason work. *Id.*, at 33,829, 33,833–33,834. Yet the record does not identify the portion of the general population in Alaska, California, and the Pacific Northwest that would accept this type of employment.[23] This deficiency respecting a crucial job qualification diminishes the usefulness of petitioners' statistical evidence. In contrast, respondents' evidence, comparing racial compositions within the work force, identifies a pool of workers willing to work during the relevant times and familiar with the workings of the industry. Surely this is more probative than the untailored general population statistics on which petitioners focus. Cf. *Hazelwood*, 433 U. S., at 308, n. 13; *Teamsters*, 431 U. S., at 339–340, n. 20.

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[23] The District Court's justification for use of general population statistics occurs in these findings of fact:

"119. Most of the jobs at the canneries entail migrant, seasonal labor. While as a general proposition, most people prefer full-year, fixed location employment near their homes, seasonal employment in the unique salmon industry is not comparable to most other types of migrant work, such as fruit and vegetable harvesting which, for example, may or may not involve a guaranteed wage.

"120. Thus, while census data is *[sic]* dominated by people who prefer full-year, fixed-location employment, such data is *[sic]* nevertheless appropriate in defining labor supplies for migrant, seasonal work." 34 EPD ¶34,437, p. 33,829.

The court's rather confusing distinction between work in the cannery industry and other "migrant, seasonal work" does not support its conclusion that the general population composes the relevant labor market.

Evidence that virtually all the employees in the major categories of at-issue jobs were white,[24] whereas about two-thirds of the cannery workers were nonwhite,[25] may not by itself suffice to establish a prima facie case of discrimination.[26] But such evidence of racial stratification puts the specific employment practices challenged by respondents into perspective. Petitioners recruit employees for at-issue jobs from outside the work force rather than from lower paying, overwhelmingly nonwhite, cannery worker positions. 34 EPD ¶34,437, p. 33,828–33,829. Information about availability of at-issue positions is conducted by word of mouth;[27] therefore,

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[24] For example, from 1971 to 1980, there were 443 persons hired in the job departments labeled "machinists," "company fishing boat," and "tender" at petitioner Castle & Cooke, Inc.'s Bumble Bee cannery; only 3 of them were nonwhites. Joint Excerpt of Record 35 (Exh. 588). In the same categories at the Red Salmon cannery of petitioner Wards Cove Packing Co., Inc., 488 whites and 42 nonwhites were hired. *Id.*, at 36 (Exh. 589).

[25] The Court points out that nonwhites are "overrepresented" among the cannery workers. *Ante*, at 654. Such an imbalance will be true in any racially stratified work force; its significance becomes apparent only upon examinaton of the pattern of segregation within the work force. In the cannery industry nonwhites are concentrated in positions offering low wages and little opportunity for promotion. Absent any showing that the "underrepresentation" of whites in this stratum is the result of a barrier to access, the "overrepresentation" of nonwhites does not offend Title VII.

[26] The majority suggests that at-issue work demands the skills possessed by "accountants, managers, boat captains, electricians, doctors, and engineers." See *ante*, at 651. It is at least theoretically possible that a disproportionate number of white applicants possessed the specialized skills required by some at-issue jobs. In fact, of course, many at-issue jobs involved skills not at all comparable to these selective examples. See 34 EPD ¶34,437, p. 33,833–33,834. Even the District Court recognized that in a year-round employment setting, "some of the positions which this court finds to be skilled, *e. g.*, truckdriving on the beach, [would] fit into the category of jobs which require skills that are readily acquirable by persons in the general public." *Id.*, at 33,841.

[27] As the Court of Appeals explained in its remand opinion:

"Specifically, the companies sought cannery workers in Native villages and through dispatches from ILWU Local 37, thus securing a work force for the lowest paying jobs which was predominantly Alaska Native and Filithe maintenance of housing and mess halls that separate the largely white noncannery work force from the cannery workers, *id.*, at 33,836, 33,843–33,844, coupled with the tendency toward nepotistic hiring,[28] are obvious barriers to employment opportunities for nonwhites. Putting to one side the issue of business justifications, it would be quite wrong to conclude that these practices have no discriminatory consequence.[29] Thus I agree with the Court of Appeals, 827 F. 2d 439, 444–445 (CA9 1987), that when the District Court makes the additional findings prescribed today, it should treat the evidence of racial stratification in the work force as a significant element of respondents' prima facie case.

III

The majority's opinion begins with recognition of the settled rule that that "a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate that is required in a 'disparate-treatment' case." *Ante*, at 645–646. It then departs from the body of law engendered by this disparate-

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pino. For other departments the companies relied on informal word-of-mouth recruitment by predominantly white superintendents and foremen, who recruited primarily white employees. That such practices can cause a discriminatory impact is obvious." 827 F. 2d, at 446.

[28] The District Court found but downplayed the fact that relatives of employees are given preferential consideration. See 34 EPD ¶ 34,437, p. 33,840. But "of 349 nepotistic hires in four upper-level departments during 1970–75, 332 were of whites, 17 of nonwhites," the Court of Appeals noted. "If nepotism exists, it is by definition a practice of giving preference to relatives, and where those doing the hiring are predominantly white, the practice necessarily has an adverse impact on nonwhites." 827 F. 2d, at 445.

[29] The Court suggests that the discrepancy in economic opportunities for white and nonwhite workers does not amount to disparate impact within the meaning of Title VII unless respondents show that it is "petitioners' fault." *Ante*, at 651; see also *ante*, at 653–654. This statement distorts the disparate-impact theory, in which the critical inquiry is whether an employer's practices *operate* to discriminate. *E. g.*, *Griggs*, 401 U. S., at 431. Whether the employer intended such discrimination is irrelevant.

impact theory, reformulating the order of proof and the weight of the parties' burdens. Why the Court undertakes these unwise changes in elementary and eminently fair rules is a mystery to me.

I respectfully dissent.

HERNANDEZ *v.* COMMISSIONER OF INTERNAL REVENUE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 87-963. Argued November 28, 1988—Decided June 5, 1989*

The Church of Scientology (Church) provides "auditing" sessions designed to increase members' spiritual awareness and training courses at which participants study the tenets of the faith and seek to attain the qualifications necessary to conduct auditing sessions. Pursuant to a central tenet known as the "doctrine of exchange," the Church has set forth schedules of mandatory fixed prices for auditing and training sessions which vary according to a session's length and level of sophistication and which are paid to branch churches. Under § 170 of the Internal Revenue Code of 1954, petitioners each sought to deduct such payments on their federal income tax returns as a "charitable contribution," which is defined as a "contribution or gift" to eligible donees. After respondent Commissioner of Internal Revenue (Commissioner or IRS) disallowed these deductions on the ground that the payments were not "charitable contributions," petitioners sought review in the Tax Court. That court upheld the Commissioner's decisions and rejected petitioners' constitutional challenges based on the Establishment and Free Exercise Clauses of the First Amendment. The Courts of Appeals affirmed on petitioners' separate appeals.

Held: Payments made to the Church's branch churches for auditing and training services are not deductible charitable contributions under § 170. Pp. 689-703.

(a) Petitioners' payments are not "contribution[s] or gift[s]" within the meaning of § 170. The legislative history of the "contribution or gift" limitation reveals that Congress intended to differentiate between unrequited payments to qualified recipients, which are deductible, and payments made to such recipients with some expectation of a *quid pro quo* in terms of goods or services, which are not deductible. To ascertain whether a given payment was made with such an expectation, the external features of the transaction in question must be examined. Here, external features strongly suggest a *quid pro quo* exchange of petitioners'

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*Together with No. 87-1616, *Graham et al.* v. *Commissioner of Internal Revenue*, on certiorari to the United States Court of Appeals for the Ninth Circuit.

money for auditing and training sessions, since the Church established fixed prices for such sessions in each branch church; calibrated particular prices to sessions of particular lengths and sophistication levels; returned a refund if services went unperformed; distributed "account cards" for monitoring prepaid, but as-yet-unclaimed, services; and categorically barred the provision of free sessions. Petitioners' argument that a *quid pro quo* analysis is inappropriate when a payment to a church either generates purely religious benefits or guarantees access to a religious service is unpersuasive, since, by its terms, § 170 makes no special preference for such payments and its legislative history offers no indication that this omission was an oversight. Moreover, petitioners' deductibility proposal would expand the charitable contribution deduction far beyond what Congress has provided to include numerous forms of payments that otherwise are not, or might not be, deductible. Furthermore, the proposal might raise problems of entanglement between church and state, since the IRS and reviewing courts would be forced to differentiate "religious" benefits or services from "secular" ones. Pp. 689–694.

(b) Disallowance of petitioners' § 170 deductions does not violate the Establishment Clause. Petitioners' argument that § 170 creates an unconstitutional denominational preference by according disproportionately harsh tax status to those religions that raise funds by imposing fixed costs for participation in certain religious practices is unpersuasive. Section 170 passes constitutional muster, since it does not facially differentiate among religious sects but applies to all religious entities, and since it satisfies the requisite three-pronged inquiry under the Clause. First, the section is neutral both in design and purpose, there being no allegation that it was born of animus to religion in general or to Scientology in particular. Second, its primary effect—encouraging gifts to charitable entities, including but not limited to religious organizations—does not advance religion, there being no allegation that it involves direct governmental action endorsing religion or a particular religious practice. Its primary secular effect is not rendered unconstitutional merely because it happens to harmonize with the tenets of religions that raise funds by soliciting unilateral donations. Third, the section threatens no excessive entanglement between church and state. Although the IRS must ascertain the prices of a religious institution's services, the regularity with which such payments are waived, and other pertinent information about the transaction, this is merely routine regulatory interaction that does not involve the type of inquiries into religious doctrine, delegation of state power, or detailed monitoring and close administrative contact that would violate the nonentanglement command. Nor does the application of § 170 require the Government to place a monetary value on particular religious benefits. Petitioners' claim to the contrary raises no need for valuation, since they have alleged only that their payments are fully exempt from a *quid pro quo* analysis—not that some portion of those payments is deductible because it exceeds the value of the acquired service. In any event, the need to ascertain what portion of a payment was a purchase and what portion was a contribution does not ineluctably create entanglement problems, since the IRS has eschewed benefit-focused valuation in cases where the economic value of a good or service is elusive, and has instead employed a valuation method which inquires into the cost (if any) to the donee of providing the good or service. This method involves merely administrative inquiries that, as a general matter, bear no resemblance to the kind of governmental surveillance that poses an intolerable risk of entanglement. Pp. 695–698.

(c) Disallowance of petitioners' § 170 deductions does not violate the Free Exercise Clause. Although it is doubtful that, as petitioners allege, the disallowance imposes a substantial burden on the central practice of Scientology by deterring adherents from engaging in auditing and training sessions and by interfering with their observance of the doctrine of exchange, *United States* v. *Lee*, 455 U. S. 252, 260, establishes that even a substantial burden is justified by the broad public interest in maintaining a sound tax system, free of myriad exceptions flowing from a wide variety of religious beliefs. That this case involves federal income taxes, rather than the Social Security taxes considered in *Lee*, is of no consequence. Also of no consequence is the fact that the Code already contains some deductions and exemptions, since the guiding principle is that a tax must be uniformly applicable to all, except as *Congress* provides explicitly otherwise. *Id.*, at 261. Indeed, the Government's interest in avoiding an exemption is more powerful here than in *Lee*, in the sense that the claimed exemption there stemmed from a specific doctrinal obligation not to pay taxes, whereas there is no limitation to petitioners' argument that they are entitled to an exemption because an incrementally larger tax burden interferes with their religious activities. Pp. 698–700.

(d) Petitioners' assertion that disallowing their claimed deductions conflicts with the IRS' longstanding practice of permitting taxpayers to deduct payments to other religious institutions in connection with certain religious practices must be rejected in the absence of any specific evidence about the nature or structure of such other transactions. In the absence of those facts, this Court cannot appraise accurately whether IRS revenue rulings allowing deductions for particular religious payments correctly applied a *quid pro quo* analysis to the practices in question and cannot discern whether those rulings contain any unifying principle that would embrace auditing and training session payments. Pp. 700–703.

819 F. 2d 1212 and 822 F. 2d 844, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 704. BRENNAN and KENNEDY, JJ., took no part in the consideration or decision of the cases.

Michael J. Graetz argued the cause and filed briefs for petitioners in both cases.

Deputy Solicitor General Merrill argued the cause for respondent in both cases. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Rose*, *Deputy Solicitor General Wallace*, *Alan I. Horowitz*, and *Robert S. Pomerance*.†

JUSTICE MARSHALL delivered the opinion of the Court.

Section 170 of the Internal Revenue Code of 1954 (Code), 26 U. S. C. § 170, permits a taxpayer to deduct from gross income the amount of a "charitable contribution." The Code defines that term as a "contribution or gift" to certain eligible donees, including entities organized and operated exclusively for religious purposes.[1] We granted certiorari to determine whether taxpayers may deduct as charitable contributions payments made to branch churches of the Church of Scientology (Church) in order to receive services known as "auditing" and "training." We hold that such payments are not deductible.

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†Briefs of *amici curiae* urging reversal were filed for the American Jewish Congress et al. by *Walter J. Rockler*, *Julius Greisman*, *Paul S. Berger*, and *Marc D. Stern*; and for the Council on Religious Freedom by *Lee Boothby*.

[1] Section 170 provides in pertinent part:

"(a) Allowance of deduction

"(1) General Rule

"There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.

. . . . .

"(c) Charitable contribution defined

"For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—

. . . . .

I

Scientology was founded in the 1950's by L. Ron Hubbard. It is propagated today by a "mother church" in California and by numerous branch churches around the world. The mother Church instructs laity, trains and ordains ministers, and creates new congregations. Branch churches, known as "franchises" or "missions," provide Scientology services at the local level, under the supervision of the mother Church. *Church of Scientology of California* v. *Commissioner*, 823 F. 2d 1310, 1313 (CA9 1987), cert. denied, 486 U. S. 1015 (1988).

Scientologists believe that an immortal spiritual being exists in every person. A person becomes aware of this spiritual dimension through a process known as "auditing."[2] Auditing involves a one-to-one encounter between a participant (known as a "preclear") and a Church official (known as

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"(2) A corporation, trust, or community chest, fund, or foundation—

"(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

"(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

"(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

"(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office. . . ."

[2] Auditing is also known as "processing," "counseling," and "pastoral counseling." 83 T. C. 575, 577 (1984), aff'd, 822 F. 2d 844 (CA9 1987).

an "auditor"). An electronic device, the E-meter, helps the auditor identify the preclear's areas of spiritual difficulty by measuring skin responses during a question and answer session. Although auditing sessions are conducted one on one, the content of each session is not individually tailored. The preclear gains spiritual awareness by progressing through sequential levels of auditing, provided in short blocks of time known as "intensives." 83 T. C. 575, 577 (1984), aff'd, 822 F. 2d 844 (CA9 1987).

The Church also offers members doctrinal courses known as "training." Participants in these sessions study the tenets of Scientology and seek to attain the qualifications necessary to serve as auditors. Training courses, like auditing sessions, are provided in sequential levels. Scientologists are taught that spiritual gains result from participation in such courses. 83 T. C., at 577.

The Church charges a "fixed donation," also known as a "price" or a "fixed contribution," for participants to gain access to auditing and training sessions. These charges are set forth in schedules, and prices vary with a session's length and level of sophistication. In 1972, for example, the general rates for auditing ranged from $625 for a 12½-hour auditing intensive, the shortest available, to $4,250 for a 100-hour intensive, the longest available. Specialized types of auditing required higher fixed donations: a 12½-hour "Integrity Processing" auditing intensive cost $750; a 12½-hour "Expanded Dianetics" auditing intensive cost $950. This system of mandatory fixed charges is based on a central tenet of Scientology known as the "doctrine of exchange," according to which any time a person receives something he must pay something back. *Id.*, at 577–578. In so doing, a Scientologist maintains "inflow" and "outflow" and avoids spiritual decline. 819 F. 2d 1212, 1222 (CA1 1987).

The proceeds generated from auditing and training sessions are the Church's primary source of income. The Church promotes these sessions not only through newspaper, magazine, and radio advertisements, but also through free lectures, free personality tests, and leaflets. The Church also encourages, and indeed rewards with a 5% discount, advance payment for these sessions. 822 F. 2d, at 847. The Church often refunds unused portions of prepaid auditing or training fees, less an administrative charge.

Petitioners in these consolidated cases each made payments to a branch church for auditing or training sessions. They sought to deduct these payments on their federal income tax returns as charitable contributions under § 170. Respondent Commissioner, the head of the Internal Revenue Service (IRS), disallowed these deductions, finding that the payments were not charitable contributions within the meaning of § 170.[3]

Petitioners sought review of these determinations in the Tax Court. That court consolidated for trial the cases of the three petitioners in No. 87–1616: Katherine Jean Graham, Richard M. Hermann, and David Forbes Maynard. The petitioner in No. 87–963, Robert L. Hernandez, agreed to be bound by the findings in the consolidated *Graham* trial, reserving his right to a separate appeal. Before trial, the Commissioner stipulated that the branch churches of Scientology are religious organizations entitled to receive tax-deductible charitable contributions under the relevant sections of the Code. This stipulation isolated as the sole statutory issue whether payments for auditing or training sessions constitute "contribution[s] or gift[s]" under § 170.[4]

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[3] The petitioner in No. 87–963, Robert L. Hernandez, was denied a deduction of $7,338 and was assessed a tax deficiency of $2,245 for 1981. 819 F. 2d 1212, 1215 (CA1 1987). Of the petitioners in No. 87–1616, Katherine Jean Graham was denied a deduction of $1,682 and was assessed a tax deficiency of $316.24 for 1972; Richard M. Hermann was denied a tax deduction of $3,922 and was assessed a tax deficiency of $803 for 1975; and David Forbes Maynard was denied a deduction of $5,000 (including a carryover of $2,385 for contributions made in 1976) and was assessed a tax deficiency of $643 for 1977. 83 T. C., at 575–579.

[4] The stipulation allowed the Tax Court to avoid having to decide whether the particular branches to which payments were made in these

The Tax Court held a 3-day bench trial during which the taxpayers and others testified and submitted documentary exhibits describing the terms under which the Church promotes and provides auditing and training sessions. Based on this record, the court upheld the Commissioner's decision. 83 T. C. 575 (1984). It observed first that the term "charitable contribution" in § 170 is synonymous with the word "gift," which case law had defined "as a *voluntary transfer* of property by the owner to another *without consideration* therefor." *Id.*, at 580, quoting *DeJong* v. *Commissioner*, 36 T. C. 896, 899 (1961) (emphasis in original), aff'd, 309 F. 2d 373 (CA9 1962). It then determined that petitioners had received consideration for their payments, namely, "the benefit of various religious services provided by the Church of Scientology." 83 T. C., at 580. The Tax Court also rejected the taxpayers' constitutional challenges based on the Establishment and Free Exercise Clauses of the First Amendment.

The Courts of Appeals for the First Circuit in petitioner Hernandez's case, and for the Ninth Circuit in Graham, Hermann, and Maynard's case, affirmed. The First Circuit rejected Hernandez's argument that under § 170, the IRS' ordinary inquiry into whether the taxpayer received consideration for his payment should not apply to "the return of a commensurate *religious* benefit, as opposed to an *economic or financial* benefit." 819 F. 2d, at 1217 (emphasis in original).

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cases qualified under § 170(c)(2) and § 501(c)(3) of the Code as tax-exempt organizations entitled to receive charitable contributions. In a separate case decided during the pendency of this litigation, the Tax Court held that the mother Church in California did not qualify as a tax-exempt organization under § 501(c)(3) for the years 1970 through 1972 because it had diverted profits to its founder and others, had conspired to impede collection of its taxes, and had conducted almost all activities for a commercial purpose. *Church of Scientology of California* v. *Commissioner*, 83 T. C. 381 (1984). The Court of Appeals for the Ninth Circuit affirmed, basing its decision solely on the ground that the Church had diverted profits for the use of private individuals. It did not address the other bases of the Tax Court's decision. *Church of Scientology of California* v. *Commissioner*, 823 F. 2d 1310 (1987), cert. denied, 486 U. S. 1015 (1988).

The court found "no indication that Congress intended to distinguish the religious benefits sought by Hernandez from the medical, educational, scientific, literary, or other benefits that could likewise provide the *quid* for the *quo* of a nondeductible payment to a charitable organization." *Ibid.* The court also rejected Hernandez's argument that it was impracticable to put a value on the services he had purchased, noting that the Church itself had "established and advertised monetary prices" for auditing and training sessions, and that Hernandez had not claimed that these prices misstated the cost of providing these sessions. *Id.*, at 1218.

Hernandez's constitutional claims also failed. Because § 170 created no denominational preference on its face, Hernandez had shown no Establishment Clause violation. *Id.*, at 1218–1221. As for the Free Exercise Clause challenge, the court determined that denying the deduction did not prevent Hernandez from paying for auditing and training sessions and thereby observing Scientology's doctrine of exchange. Moreover, granting a tax exemption would compromise the integrity and fairness of the tax system. *Id.*, at 1221–1225.

The Ninth Circuit also found that the taxpayers had received a "measurable, specific return . . . as a quid pro quo for the donation" they had made to the branch churches. 822 F. 2d, at 848. The court reached this result by focusing on "the external features" of the auditing and training transactions, an analytic technique which "serves as an expedient for any more intrusive inquiry into the motives of the payor." *Ibid.* Whether a particular exchange generated secular or religious benefits to the taxpayer was irrelevant, for under § 170 "[i]t is the structure of the transaction, and not the type of benefit received, that controls." *Id.*, at 849.

The Ninth Circuit also rejected the taxpayers' constitutional arguments. The tax deduction provision did not violate the Establishment Clause because § 170 is "neutral in its design" and reflects no intent "to visit a disability on a particular religion." *Id.*, at 853. Furthermore, that the taxpayers would "have less money to pay to the Church, or that the Church [would] receive less money, [did] not rise to the level of a burden on appellants' ability to exercise their religious beliefs." *Id.*, at 851. Indeed, because the taxpayers could still make charitable donations to the branch church, they were "not put to the choice of abandoning the doctrine of exchange or losing the government benefit, for they may have both." *Ibid.* Finally, the court noted that the compelling governmental interest in "the maintenance of a sound and uniform tax system" counseled against granting a free exercise exemption. *Id.*, at 852–853.

We granted certiorari, 485 U. S. 1005 (1988); 486 U. S. 1022 (1988), to resolve a Circuit conflict concerning the validity of charitable deductions for auditing and training payments.[5] We now affirm.

II

For over 70 years, federal taxpayers have been allowed to deduct the amount of contributions or gifts to charitable, religious, and other eleemosynary institutions. See 2 B. Bittker, Federal Taxation of Income, Estates and Gifts ¶35.1.1 (1981) (tracing history of charitable deduction). Section 170, the present provision, was enacted in 1954; it requires a taxpayer claiming the deduction to satisfy a number of conditions.[6] The Commissioner's stipulation in this case, however, has narrowed the statutory inquiry to one such condition: whether petitioners' payments for auditing and training sessions are "contribution[s] or gift[s]" within the meaning of § 170.

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[5] Compare *Christiansen* v. *Commissioner*, 843 F. 2d 418 (CA10 1988) (holding payments not deductible), cert. pending, No. 87–2023; *Miller* v. *IRS*, 829 F. 2d 500 (CA4 1987) (same), cert. pending, No. 87–1449, with *Neher* v. *Commissioner*, 852 F. 2d 848 (CA6 1988) (holding payments deductible); *Foley* v. *Commissioner*, 844 F. 2d 94 (CA2 1988) (same), cert. pending, No. 88–102; *Staples* v. *Commissioner*, 821 F. 2d 1324 (CA8 1987) (same), cert. pending, No. 87–1382. The rulings for the taxpayer in the *Neher*, *Foley*, and *Staples* cases rested on statutory, not constitutional, grounds.

[6] The charitable transfer must be made to a qualified recipient, § 170(c), within the taxable year, § 170(a)(1), and consist of cash or qualified property, 26 U. S. C. §§ 170(e)–(h) (1982 ed. and Supp. V), not exceeding

The legislative history of the "contribution or gift" limitation, though sparse, reveals that Congress intended to differentiate between unrequited payments to qualified recipients and payments made to such recipients in return for goods or services. Only the former were deemed deductible. The House and Senate Reports on the 1954 tax bill, for example, both define "gifts" as payments "made with no expectation of a financial return commensurate with the amount of the gift." S. Rep. No. 1622, 83d Cong., 2d Sess., 196 (1954); H. R. Rep. No. 1337, 83d Cong., 2d Sess., A44 (1954). Using payments to hospitals as an example, both Reports state that the gift characterization should not apply to "a payment by an individual to a hospital *in consideration of* a binding obligation to provide medical treatment for the individual's employees. It would apply only if there were no expectation of any quid pro quo from the hospital." S. Rep. No. 1622, *supra*, at 196 (emphasis added); H. Rep. No. 1337, *supra*, at A44 (emphasis added).[7]

In ascertaining whether a given payment was made with "the expectation of any quid pro quo," S. Rep. No. 1622, *supra*, at 196; H. Rep. No. 1337, *supra*, at A44, the IRS has customarily examined the external features of the transaction in question. This practice has the advantage of obviat-

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a specified percentage of the taxpayer's income in the year of payment or (where a carryover is permitted) in subsequent years. 26 U. S. C. §§ 170(b), 170(d) (1982 ed. and Supp. V).

[7] The portions of these Reports explicating the term "gifts" actually address a closely related provision of the Code, § 162(b), which refers specifically to § 170. Section 162(b) provides, in pertinent part, that a taxpayer may not deduct as a trade or business expense a "contribution or gift" which would have been deductible under § 170 were it not for the fact that the taxpayer had already met the maximum amount (measured as a percentage of income) which § 170(b) permits to be deducted.

ing the need for the IRS to conduct imprecise inquiries into the motivations of individual taxpayers. The lower courts have generally embraced this structural analysis. See, *e. g.*, *Singer Co.* v. *United States*, 449 F. 2d 413, 422–423 (Ct. Cl. 1971) (applying this approach and collecting cases), cited in *United States* v. *American Bar Endowment*, 477 U. S. 105, 117 (1986); see also 2 B. Bittker, *supra*, at ¶35.1.3 (collecting cases). We likewise focused on external features in *United States* v. *American Bar Endowment*, *supra*, to resolve the taxpayers' claims that they were entitled to partial deductions for premiums paid to a charitable organization for insurance coverage; the taxpayers contended that they had paid unusually high premiums in an effort to make a contribution along with their purchase of insurance. We upheld the Commissioner's disallowance of the partial deductions because the taxpayers had failed to demonstrate, at a minimum, the existence of comparable insurance policies with prices lower than those of the policy they had each purchased. In so doing, we stressed that "[t]he *sine qua non* of a charitable contribution is a transfer of money or property *without adequate consideration.*" *Id.*, at 118 (emphasis added in part).[8]

In light of this understanding of § 170, it is readily apparent that petitioners' payments to the Church do not qualify as "contribution[s] or gift[s]." As the Tax Court found, these payments were part of a quintessential *quid pro quo* exchange: in return for their money, petitioners received an identifiable benefit, namely, auditing and training sessions. The Church established fixed price schedules for auditing and training sessions in each branch church; it calibrated particular prices to auditing or training sessions of particular lengths and levels of sophistication; it returned a refund if auditing and training services went unperformed; it distributed "account cards" on which persons who had paid money to the Church could monitor what prepaid services they had not yet claimed; and it categorically barred provision of auditing or training sessions for free.[9] Each of these practices reveals the inherently reciprocal nature of the exchange.

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[8] The sole taxpayer in *American Bar Endowment* who had demonstrated the existence of a lower premium insurance program failed to show that he was aware of this less expensive option at the time he purchased his insurance. 477 U. S., at 118.

Petitioners do not argue that such a structural analysis is inappropriate under § 170, or that the external features of the auditing and training transactions do not strongly suggest a *quid pro quo* exchange. Indeed, the petitioners in the consolidated *Graham* case conceded at trial that they expected to receive specific amounts of auditing and training in return for their payments. 822 F. 2d, at 850. Petitioners argue instead that they are entitled to deductions because a *quid pro quo* analysis is inappropriate under § 170 when the benefit a taxpayer receives is purely religious in nature. Along the same lines, petitioners claim that payments made for the right to participate in a religious service should be automatically deductible under § 170.

We cannot accept this statutory argument for several reasons. First, it finds no support in the language of § 170. Whether or not Congress could, consistent with the Establishment Clause, provide for the automatic deductibility of a payment made to a church that either generates religious benefits or guarantees access to a religious service, that is a choice Congress has thus far declined to make. Instead, Congress has specified that a payment to an organization operated exclusively for religious (or other eleemosynary) purposes is deductible *only* if such a payment is a "contribution or gift." 26 U. S. C. § 170(c). The Code makes no special preference for payments made in the expectation of gaining religious benefits or access to a religious service. *Foley* v. *Commissioner*, 844 F. 2d 94, 98 (CA2 1988) (Newman, J., dissenting), cert. pending, No. 88–102. The House and Senate Reports on § 170, and the other legislative history of that provision, offer no indication that Congress' failure to enact such a preference was an oversight.

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[9] The Tax Court referred to a Church policy directive which stated:

"Price cuts are forbidden under any guise.

"1. PROCESSING MAY NEVER BE GIVEN AWAY BY AN ORG. Processing is too expensive to deliver.

. . . . .

"9. ONLY FULLY CONTRACTED STAFF IS AWARDED FREE SERVICE, AND THIS IS DONE BY INVOICE AND LEGAL NOTE WHICH BECOMES DUE AND PAYABLE IF THE CONTRACT IS BROKEN." 83 T. C., at 577–578, n. 5.

Second, petitioners' deductibility proposal would expand the charitable contribution deduction far beyond what Congress has provided. Numerous forms of payments to eligible donees plausibly could be categorized as providing a religious benefit or as securing access to a religious service. For example, some taxpayers might regard their tuition payments to parochial schools as generating a religious benefit or as securing access to a religious service; such payments, however, have long been held not to be charitable contributions under § 170. *Foley*, *supra*, at 98, citing *Winters* v. *Commissioner*, 468 F. 2d 778 (CA2 1972); see *id.*, at 781 (noting Congress' refusal to enact legislation permitting taxpayers to deduct parochial school tuition payments). Taxpayers might make similar claims about payments for church-sponsored counseling sessions or for medical care at church-affiliated hospitals that otherwise might not be deductible. Given that, under the First Amendment, the IRS can reject otherwise valid claims of religious benefit only on the ground that a taxpayers' alleged beliefs are not sincerely held, but not on the ground that such beliefs are inherently irreligious, see *United States* v. *Ballard*, 322 U. S. 78 (1944), the resulting tax deductions would likely expand the charitable contribution provision far beyond its present size. We are loath to effect this result in the absence of supportive congressional intent. Cf. *United States* v. *Lee*, 455 U. S. 252, 259–261 (1982).

Finally, the deduction petitioners seek might raise problems of entanglement between church and state. If framed as a deduction for those payments generating benefits of a religious nature for the payor, petitioners' proposal would inexorably force the IRS and reviewing courts to differentiate "religious" benefits from "secular" ones. If framed as a deduction for those payments made in connection with a religious service, petitioners' proposal would force the IRS and the judiciary into differentiating "religious" services from "secular" ones. We need pass no judgment now on the constitutionality of such hypothetical inquiries, but we do note that "pervasive monitoring" for "the subtle or overt presence of religious matter" is a central danger against which we have held the Establishment Clause guards. *Aguilar* v. *Felton*, 473 U. S. 402, 413 (1985); see also *Widmar* v. *Vincent*, 454 U. S. 263, 272, n. 11 (1981) ("[T]he University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech'" than by opening its forum to religious as well as nonreligious speakers); cf. *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 716 (1981).

Accordingly, we conclude that petitioners' payments to the Church for auditing and training sessions are not "contribution[s] or gift[s]" within the meaning of that statutory expression.[10]

III

We turn now to petitioners' constitutional claims based on the Establishment Clause and the Free Exercise Clause of the First Amendment.

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[10] Petitioners have not argued here that their payments qualify as "dual payments" under IRS regulations and that they are therefore entitled to a partial deduction to the extent their payments exceeded the value of the benefit received. See *American Bar Endowment*, 477 U. S., at 117 (citing Rev. Rul. 67-246, 1967-2 Cum. Bull. 104). We thus have no occasion to decide this issue.

A

Petitioners argue that denying their requested deduction violates the Establishment Clause in two respects. First, § 170 is said to create an unconstitutional denominational preference by according disproportionately harsh tax status to those religions that raise funds by imposing fixed costs for participation in certain religious practices. Second, § 170 allegedly threatens governmental entanglement with religion because it requires the IRS to entangle itself with religion by engaging in "supervision of religious beliefs and practices" and "valuation of religious services." Brief for Petitioners 44.

Our decision in *Larson* v. *Valente*, 456 U. S. 228 (1982), supplies the analytic framework for evaluating petitioners' contentions. *Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971).[11]

Thus analyzed, § 170 easily passes constitutional muster. The line which § 170 draws between deductible and nondeductible payments to statutorily qualified organizations does not differentiate among sects. Unlike the Minnesota statute at issue in *Larson*, which facially exempted from state registration and reporting requirements only those religious organizations that derived more than half their funds from members, § 170 makes no "explicit and deliberate distinctions between different religious organizations," 456

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[11] " 'First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968); finally, the statute must not foster "an excessive governmental entanglement with religion." *Walz* [v. *Tax Comm'n*, 397 U. S. 664, 674 (1970)].' " *Lemon* v. *Kurtzman*, 403 U. S., at 612–613, quoted in *Larson* v. *Valente*, 456 U. S., at 252.

U. S., at 246–247, n. 23, applying instead to all religious entities.

Section 170 also comports with the *Lemon* test. First, there is no allegation that § 170 was born of animus to religion in general or Scientology in particular. Cf. *Larson*, *supra*, at 254–255 (history of Minnesota restriction reveals hostility to "Moonies" and intent to "get at . . . people that are running around airports"). The provision is neutral both in design and purpose.

Second, the primary effect of § 170—encouraging gifts to charitable entities, including but not limited to religious organizations—is neither to advance nor inhibit religion. It is not alleged here that § 170 involves "[d]irect government action endorsing religion or a particular religious practice." *Wallace* v. *Jaffree*, 472 U. S. 38, 69 (1985) (O'CONNOR, J., concurring in judgment). It may be that a consequence of the *quid pro quo* orientation of the "contribution or gift" requirement is to impose a disparate burden on those charitable and religious groups that rely on sales of commodities or services as a means of fundraising, relative to those groups that raise funds primarily by soliciting unilateral donations. But a statute primarily having a secular effect does not violate the Establishment Clause merely because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan* v. *Maryland*, 366 U. S. 420, 442 (1961); see also *Bob Jones University* v. *United States*, 461 U. S. 574, 604, n. 30 (1983).

Third, § 170 threatens no excessive entanglement between church and state. To be sure, ascertaining whether a payment to a religious institution is part of a *quid pro quo* transaction may require the IRS to ascertain from the institution the prices of its services and commodities, the regularity with which payments for such services and commodities are waived, and other pertinent information about the transaction. But routine regulatory interaction which involves no inquiries into religious doctrine, see *Presbyterian Church in*

U. S. v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440, 451 (1969), no delegation of state power to a religious body, see *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116 (1982), and no "detailed monitoring and close administrative contact" between secular and religious bodies, see *Aguilar*, 473 U. S., at 414, does not of itself violate the nonentanglement command. See *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U. S. 290, 305–306 (1985) (stating that nonentanglement principle "does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations" or the recordkeeping requirements of the Fair Labor Standards Act) (citation omitted). As we have observed, *supra*, at 694, it is petitioners' interpretation of § 170, requiring the Government to distinguish between "secular" and "religious" benefits or services, which may be "fraught with the sort of entanglement that the Constitution forbids." *Lemon*, *supra*, at 620.

Nor does the application of § 170 to religious practices require the Government to place a monetary value on particular religious benefits. As an initial matter, petitioners' claim here raises no need for valuation, for they have alleged only that their payments are fully exempt from a *quid pro quo* analysis—not that some portion of these payments is deductible because it exceeds the value of the acquired service. Cf. *American Bar Endowment*, 477 U. S., at 117 (describing "dual character" payments) (citing, *inter alia*, Rev. Rul. 68–432, 1968–2 Cum. Bull. 104, 105); see n. 10, *supra*. In any event, the need to ascertain what portion of a payment was a purchase and what portion was a contribution does not ineluctably create entanglement problems by forcing the Government to place a monetary value on a religious benefit. In cases where the economic value of a good or service is elusive—where, for example, no comparable good or service is sold in the marketplace—the IRS has eschewed benefit-focused valuation. Instead, it has often employed as an alternative method of valuation an inquiry into the cost (if any) to the donee of providing the good or service. See, *e. g.*, *Oppewal* v. *Commissioner*, 468 F. 2d 1000, 1002 (CA1 1972) (cost of providing a "religiously-oriented" education); *Winters* v. *Commissioner*, 468 F. 2d 778 (CA2 1972) (same); *DeJong* v. *Commissioner*, 309 F. 2d 373 (CA9 1962) (same). This valuation method, while requiring qualified religious institutions to disclose relevant information about church costs to the IRS, involves administrative inquiries that, as a general matter, "bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion." *Tony and Susan Alamo Foundation*, *supra*, at 305; cf. *Lemon*, 403 U. S., at 621–622 (school-aid statute authorizing government inspection of parochial school records created impermissible "intimate and continuing relationship between church and state" because it required State "to determine which expenditures are religious and which are secular").[12]

B

Petitioners also contend that disallowance of their § 170 deductions violates their right to the free exercise of religion by "plac[ing] a heavy burden on the central practice of Scientology." Brief for Petitioners 47. The precise nature of this claimed burden is unclear, but it appears to operate in two ways. First, the deduction disallowance is said to deter adherents from engaging in auditing and training sessions. Second, the deduction disallowance is said to interfere with observance of the doctrine of exchange, which mandates equality of an adherent's "outflow" and "inflow."

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[12] We do not rule out the possibility that, under the circumstances of a particular case, an IRS inquiry under § 170 into a religious institution's expenses might raise entanglement problems. Because petitioners' claim necessitates no valuation inquiry, however, we need only decide here that such inquiries into cost under § 170 generally pose no constitutional problem.

The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden. *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 141–142 (1987); *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S., at 717–719; *Wisconsin* v. *Yoder*, 406 U. S. 205, 220–221 (1972). It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds. *Thomas*, *supra*, at 716. We do, however, have doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one. Neither the payment nor the receipt of taxes is forbidden by the Scientology faith generally, and Scientology does not proscribe the payment of taxes in connection with auditing or training sessions specifically. Cf. *United States* v. *Lee*, 455 U. S., at 257. Any burden imposed on auditing or training therefore derives solely from the fact that, as a result of the deduction denial, adherents have less money available to gain access to such sessions. This burden is no different from that imposed by any public tax or fee; indeed, the burden imposed by the denial of the "contribution or gift" deduction would seem to pale by comparison to the overall federal income tax burden on an adherent. Likewise, it is unclear why the doctrine of exchange would be violated by a deduction disallowance so long as an adherent is free to equalize "outflow" with "inflow" by paying for as many auditing and training sessions as he wishes. See 822 F. 2d, at 850–853 (questioning substantiality of burden on Scientologists); 819 F. 2d, at 1222–1225 (same).

In any event, we need not decide whether the burden of disallowing the § 170 deduction is a substantial one, for our decision in *Lee* establishes that even a substantial burden would be justified by the "broad public interest in maintaining a sound tax system," free of "myriad exceptions flowing from a wide variety of religious beliefs." 455 U. S., at 260. In *Lee*, we rejected an Amish taxpayer's claim that the Free Exercise Clause commanded his exemption from Social Security tax obligations, noting that "[t]he tax system could not function if denominations were allowed to challenge the tax system" on the ground that it operated "in a manner that violates their religious belief." *Ibid.* That these cases involve federal income taxes, not the Social Security system, is of no consequence. *Ibid.* The fact that Congress has already crafted some deductions and exemptions in the Code also is of no consequence, for the guiding principle is that a tax "must be uniformly applicable to all, except as *Congress* provides explicitly otherwise." *Id.*, at 261 (emphasis added). Indeed, in one respect, the Government's interest in avoiding an exemption is more powerful here than in *Lee;* the claimed exemption in *Lee* stemmed from a specific doctrinal obligation not to pay taxes, whereas petitioners' claimed exemption stems from the contention that an incrementally larger tax burden interferes with their religious activities. This argument knows no limitation. We accordingly hold that petitioners' free exercise challenge is without merit.

IV

We turn, finally, to petitioners' assertion that disallowing their claimed deduction is at odds with the IRS' longstanding practice of permitting taxpayers to deduct payments made to other religious institutions in connection with certain religious practices. Through the appellate stages of this litigation, this claim was framed essentially as one of selective prosecution. The Courts of Appeals for the First and Ninth Circuits summarily rejected this claim, finding no evidence of the intentional governmental discrimination necessary to support such a claim. 822 F. 2d, at 853 (no showing of "the type of hostility to a target of law enforcement that would support a claim of selective enforcement"); 819 F. 2d, at 1223 (no "discriminatory intent" proved).

In their arguments to this Court, petitioners have shifted emphasis. They now make two closely related claims. First, the IRS has accorded payments for auditing and training disparately harsh treatment compared to payments to other churches and synagogues for their religious services: Recognition of a comparable deduction for auditing and training payments is necessary to cure this administrative inconsistency. Second, Congress, in modifying § 170 over the years, has impliedly acquiesced in the deductibility of payments to these other faiths; because payments for auditing and training are indistinguishable from these other payments, they fall within the principle acquiesced in by Congress that payments for religious services are deductible under § 170.

Although the Commissioner demurred at oral argument as to whether the IRS, in fact, permits taxpayers to deduct payments made to purchase services from other churches and synagogues, Tr. of Oral Arg. 30–31, the Commissioner's periodic revenue rulings have stated the IRS' position rather clearly. A 1971 ruling, still in effect, states: "Pew rents, building fund assessments, and periodic dues paid to a church . . . are all methods of making contributions to the church, and such payments are deductible as charitable contributions within the limitations set out in section 170 of the Code." Rev. Rul. 70–47, 1970–1 Cum. Bull. 49 (superseding A.R.M. 2, Cum. Bull. 150 (1919)). We also assume for purposes of argument that the IRS also allows taxpayers to deduct "specified payments for attendance at High Holy Day services, for tithes, for torah readings and for memorial plaques." *Foley* v. *Commissioner*, 844 F. 2d, at 94, 96.

The development of the present litigation, however, makes it impossible for us to resolve petitioners' claim that they have received unjustifiably harsh treatment compared to adherents of other religions. The relevant inquiry in determining whether a payment is a "contribution or gift" under § 170 is, as we have noted, not whether the payment secures religious benefits or access to religious services, but whether the transaction in which the payment is involved is structured as a *quid pro quo* exchange. To make such a determination in this case, the Tax Court heard testimony and received documentary proof as to the terms and structure of the auditing and training transactions; from this evidence it made factual findings upon which it based its conclusion of nondeductibility, a conclusion we have held consonant with § 170 and with the First Amendment.

Perhaps because the theory of administrative inconsistency emerged only on appeal, petitioners did not endeavor at trial to adduce from the IRS or other sources any specific evidence about other religious faiths' transactions. The IRS' revenue rulings, which merely state the agency's conclusions as to deductibility and which have apparently never been reviewed by the Tax Court or any other judicial body, also provide no specific facts about the nature of these other faiths' transactions. In the absence of such facts, we simply have no way (other than the wholly illegitimate one of relying on our personal experiences and observations) to appraise accurately whether the IRS' revenue rulings have correctly applied a *quid pro quo* analysis with respect to any or all of the religious practices in question. We do not know, for example, whether payments for other faiths' services are truly obligatory or whether any or all of these services are generally provided whether or not the encouraged "mandatory" payment is made.

The IRS' application of the "contribution or gift" standard may be right or wrong with respect to these other faiths, or it may be right with respect to some religious practices and wrong with respect to others. It may also be that some of these payments are appropriately classified as partially deductible "dual payments." With respect to those religions where the structure of transactions involving religious services is established not centrally but by individual congregations, the proper point of reference for a *quid pro quo* analysis might be the individual congregation, not the religion as a whole. Only upon a proper factual record could we make these determinations. Absent such a record, we must reject petitioners' administrative consistency argument.[13]

Petitioners' congressional acquiescence claim fails for similar reasons. Even if one assumes that Congress has acquiesced in the IRS' ruling with respect to "[p]ew rents, building fund assessments, and periodic dues," Rev. Rul. 70–47, 1970–1 Cum. Bull. 49, the fact is that the IRS' 1971 ruling articulates no broad principle of deductibility, but instead merely identifies as deductible three discrete types of payments. Having before us no information about the nature or structure of these three payments, we have no way of discerning any possible unifying principle, let alone whether such a principle would embrace payments for auditing and training sessions.

V

For the reasons stated herein, the judgments of the Courts of Appeals are hereby

Affirmed.

JUSTICE BRENNAN and JUSTICE KENNEDY took no part in the consideration or decision of these cases.

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[13] Petitioners argue that an unofficial "question and answer guidance package" recently issued by an IRS official requires deductibility of payments for auditing and training sessions. Referring to the revenue ruling on pew rents, the brochure states that "fixed payments for similar religious services" are fully deductible. See IRS Official Explains New Examination-Education Program on Charitable Contributions to Tax-Exempt Organizations, BNA Daily Report for Executives, Special Report No. 186, J–1, J–3 (Sept. 26, 1988) (cited in Reply Brief for Petitioners 6). In ascertaining the IRS' justifications for its administrative practice, however, our practice is to rely on the agency's official rulings, not on the unofficial interpretations of particular IRS officials. In any event, the brochure on which petitioners rely was not included in the record before the Tax Court or the Courts of Appeals in these cases, and, in fact, was issued months after we granted certiorari.

JUSTICE O'CONNOR, with whom JUSTICE SCALIA joins, dissenting.

The Court today acquiesces in the decision of the Internal Revenue Service (IRS) to manufacture a singular exception to its 70-year practice of allowing fixed payments indistinguishable from those made by petitioners to be deducted as charitable contributions. Because the IRS cannot constitutionally be allowed to select which religions will receive the benefit of its past rulings, I respectfully dissent.

The cases before the Court have an air of artificiality about them that is due to the IRS' dual litigation strategy against the Church of Scientology (Church). As the Court notes, *ante*, at 686–687, n. 4, the IRS has successfully argued that the mother Church of Scientology was not a tax-exempt organization from 1970 to 1972 because it had diverted profits to the founder of Scientology and others, conspired to impede collection of its taxes, and conducted almost all of its activities for a commercial purpose. See *Church of Scientology of California* v. *Commissioner*, 83 T. C. 381 (1984), aff'd, 823 F. 2d 1310 (CA9 1987), cert. denied, 486 U. S. 1015 (1988). In the cases before the Court today, however, the IRS decided to contest the payments made to Scientology under 26 U. S. C. § 170 rather than challenge the tax-exempt status of the various branches of the Church to which the payments were made. According to the Deputy Solicitor General, the IRS challenged the payments themselves in order to expedite matters. Tr. of Oral Arg. 26–29. See also *Neher* v. *Commissioner*, 852 F. 2d 848, 850–851 (CA6 1988). As part of its litigation strategy in these cases, the IRS agreed to several stipulations which, in my view, necessarily determine the proper approach to the questions presented by petitioners.

The stipulations, relegated to a single sentence by the Court, *ante*, at 686, established that Scientology was at all relevant times a religion; that each Scientology branch to which payments were made was at all relevant times a "church" within the meaning of § 170(b)(1)(A)(i); and that

Scientology was at all times a "corporation" within the meaning of § 170(c)(2) and exempt from general income taxation under 26 U. S. C. § 501(a). See App. 38, ¶¶ 52–53; 83 T. C. 575, 576 (1984), aff'd, 822 F. 2d 844 (CA9 1987). As the Solicitor General recognizes, it follows from these stipulations that Scientology operates for "'charitable purposes'" and puts the "public interest above the private interest." Brief for Respondent 30. See also *Neher*, *supra*, at 855. Moreover, the stipulations establish that the payments made by petitioners are fixed donations made by individuals to a tax-exempt religious organization in order to participate in religious services, and are not based on "market prices set to reap the profits of a commercial moneymaking venture." *Staples* v. *Commissioner*, 821 F. 2d 1324, 1328 (CA8 1987), cert. pending, No. 87–1382. The Tax Court, however, appears to have ignored the stipulations. It concluded, perhaps relying on its previous opinion in *Church of Scientology*, that "Scientology operates in a commercial manner in providing [auditing and training]. In fact, one of its articulated goals is to make money." 83 T. C., at 578. The Solicitor General has duplicated the error here, referring on numerous occasions to the commercial nature of Scientology in an attempt to negate the effect of the stipulations. See Brief for Respondent 13–14, 23, 25, 44.

It must be emphasized that the IRS' position here is *not* based upon the contention that a portion of the knowledge received from auditing or training is of secular, commercial, nonreligious value. Thus, the denial of a deduction in these cases bears no resemblance to the denial of a deduction for religious-school tuition up to the market value of the secularly useful education received. See *Oppewal* v. *Commissioner*, 468 F. 2d 1000 (CA1 1972); *Winters* v. *Commissioner*, 468 F. 2d 778 (CA2 1972); *DeJong* v. *Commissioner*, 309 F. 2d 373 (CA9 1962). Here the IRS denies deductibility solely on the basis that the exchange is a *quid pro quo*, even though the *quid* is exclusively of spiritual or religious worth. Respondent cites no instances in which this has been done before, and there are good reasons why.

When a taxpayer claims as a charitable deduction part of a fixed amount given to a charitable organization in exchange for benefits that have a commercial value, the allowable portion of that claim is computed by subtracting from the total amount paid the value of the physical benefit received. If at a charity sale one purchases for $1,000 a painting whose market value is demonstrably no more than $50, there has been a contribution of $950. The same would be true if one purchases a $1,000 seat at a charitable dinner where the food is worth $50. An identical calculation can be made where the *quid* received is not a painting or a meal, but an intangible such as entertainment, so long as that intangible has some market value established in a noncontributory context. Hence, one who purchases a ticket to a concert, at the going rate for concerts by the particular performers, makes a charitable contribution of zero even if it is announced in advance that all proceeds from the ticket sales will go to charity. The performers may have made a charitable contribution, but the audience has paid the going rate for a show.

It becomes impossible, however, to compute the "contribution" portion of a payment to a charity where what is received in return is not merely an intangible, but an intangible (or, for that matter a tangible) that is not bought and sold except in donative contexts so that the only "market" price against which it can be evaluated is a market price that always includes donations. Suppose, for example, that the charitable organization that traditionally solicits donations on Veterans Day, in exchange for which it gives the donor an imitation poppy bearing its name, were to establish a flat rule that no one gets a poppy without a donation of at least $10. One would have to say that the "market" rate for such poppies was $10, but it would assuredly not be true that everyone who "bought" a poppy for $10 made no contribution. Similarly, if one buys a $100 seat at a prayer breakfast—receiving as the *quid pro quo* food for both body and soul—it would make no sense to say that no charitable contribution whatever has occurred simply because the "going rate" for all prayer breakfasts (with equivalent bodily food) is $100. The latter may well be true, but that "going rate" *includes* a contribution.

Confronted with this difficulty, and with the constitutional necessity of not making irrational distinctions among taxpayers, and with the even higher standard of equality of treatment among *religions* that the First Amendment imposes, the Government has only two practicable options with regard to distinctively religious *quids pro quo:* to disregard them all, or to tax them all. Over the years it has chosen the former course.

Congress enacted the first charitable contribution exception to income taxation in 1917. War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 330. A mere two years later, in A.R.M. 2, 1 Cum. Bull. 150 (1919), the IRS gave its first blessing to the deductions of fixed payments to religious organizations as charitable contributions:

> "[T]he distinction of pew rents, assessments, church dues, and the like from basket collections is hardly warranted by the act. The act reads 'contributions' and 'gifts.' It is felt that all of these come within the two terms.
>
> "In substance it is believed that these are simply methods of contributing although in form they may vary. Is a basket collection given involuntarily to be distinguished from an envelope system, the latter being regarded as 'dues'? From a technical angle, the pew rents may be differentiated, but in practice the so-called 'personal accommodation' they may afford is conjectural. It is believed that the real intent is to contribute and not to hire a seat or pew for personal accommodation. In fact, basket contributors sometimes receive the same accommodation informally."

The IRS reaffirmed its position in 1970, ruling that "[p]ew rents, building fund assessments and periodic dues paid to a church . . . are all methods of making contributions to the church and such payments are deductible as charitable contributions." Rev. Rul. 70–47, 1970–1 Cum. Bull. 49. Similarly, notwithstanding the "form" of Mass stipends as fixed payments for specific religious services, see *infra*, at 709, the IRS has allowed charitable deductions of such payments. See Rev. Rul. 78–366, 1978–2 Cum. Bull. 241.

These rulings, which are "official interpretation[s] of [the tax laws] by the [IRS]," Rev. Proc. 78–24, 1978–2 Cum. Bull. 503, 504, flatly contradict the Solicitor General's claim that there "is no administrative practice recognizing that payments made in exchange for religious benefits are tax deductible." Brief for Respondent 16. Indeed, an Assistant Commissioner of the IRS recently explained in a "question and answer guidance package" to tax-exempt organizations that "[i]n contrast to tuition payments, religious observances generally are not regarded as yielding private benefits to the donor, who is viewed as receiving only incidental benefits when attending the observances. The primary beneficiaries are viewed as being the general public and members of the faith. Thus, payments for saying masses, pew rents, tithes, and other payments involving fixed donations for similar religious services, are fully deductible contributions." IRS Official Explains New Examination-Education Program on Charitable Contributions to Tax-Exempt Organizations, BNA Daily Report for Executives, Special Report No. 186, J–1, J–3 (Sept. 26, 1988). Although this guidance package may not be as authoritative as IRS rulings, see *ante*, at 703, n. 13, in the absence of any contrary indications it does reflect the continuing adherence of the IRS to its practice of allowing deductions for fixed payments for religious services.

There can be no doubt that at least some of the fixed payments which the IRS has treated as charitable deductions, or which the Court assumes the IRS would allow taxpayers to deduct, *ante*, at 690–691, are as "inherently reciprocal," *ante*, at 692, as the payments for auditing at issue here. In exchange for their payment of pew rents, Christians receive particular seats during worship services. See Encyclopedic Dictionary of Religion 2760 (1979). Similarly, in some synagogues attendance at the worship services for Jewish High Holy Days is often predicated upon the purchase of a general admission ticket or a reserved seat ticket. See J. Feldman, H. Fruhauf, & M. Schoen, Temple Management Manual, ch. 4, p. 10 (1984). Religious honors such as publicly reading from Scripture are purchased or auctioned periodically in some synagogues of Jews from Morocco and Syria. See H. Dobrinsky, A Treasury of Sephardic Laws and Customs 164, 175–177 (1986). Mormons must tithe their income as a necessary but not sufficient condition to obtaining a "temple recommend," *i. e.*, the right to be admitted into the temple. See The Book of Mormon, 3 Nephi 24:7–12 (1921); Reorganized Church of Jesus Christ of Latter-day Saints, Book of Doctrine and Covenants § 106:1b (1978); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 330, n. 4 (1987). A Mass stipend—a fixed payment given to a Catholic priest, in consideration of which he is obliged to apply the fruits of the Mass for the intention of the donor—has similar overtones of exchange. According to some Catholic theologians, the nature of the pact between a priest and a donor who pays a Mass stipend is "a bilateral contract known as *do ut facias*. One person agrees to give while the other party agrees to do something in return." 13 New Catholic Encyclopedia, Mass Stipend, p. 715 (1967). A finer example of a *quid pro quo* exchange would be hard to formulate.

This is not a situation where the IRS has explicitly and affirmatively reevaluated its longstanding interpretation of § 170 and decided to analyze *all* fixed religious contributions under a *quid pro quo* standard. There is no indication whatever that the IRS has abandoned its 70-year practice with respect to payments made by those other than Scientologists. In 1978, when it ruled that payments for auditing and training were not charitable contributions under § 170, the IRS did not cite—much less try to reconcile—its previous rulings concerning the deductibility of other forms of fixed payments for religious services or practices. See Rev. Rul. 78–189, 1978–1 Cum. Bull. 68 (equating payments for auditing with tuition paid to religious schools).

Nevertheless, respondent now attempts to reconcile his previous rulings with his decision in these cases by relying on a distinction between direct and incidental benefits in exchange for payments made to a charitable organization. This distinction, adumbrated as early as the IRS' 1919 ruling, recognizes that even a deductible charitable contribution may generate certain benefits for the donor. As long as the benefits remain "incidental" and do not indicate that the payment was actually made for the "personal accommodation" of the donor, the payment will be deductible. It is respondent's view that the payments made by petitioners should not be deductible under § 170 because the "unusual facts in these cases . . . demonstrate that the payments were made primarily for 'personal accommodation.'" Brief for Respondent 41. Specifically, the Solicitor General asserts that "the rigid connection between the provision of auditing and training services and payment of the fixed price" indicates a *quid pro quo* relationship and "reflect[s] the value that petitioners expected to receive for their money." *Id.*, at 16.

There is no discernible reason why there is a more rigid connection between payment and services in the religious practices of Scientology than in the religious practices of the faiths described above. Neither has respondent explained why the benefit received by a Christian who obtains the pew of his or her choice by paying a rental fee, a Jew who gains entrance to High Holy Day services by purchasing a ticket, a Mormon who makes the fixed payment necessary for a temple recommend, or a Catholic who pays a Mass stipend, is incidental to the real benefit conferred on the "general public and members of the faith," BNA Daily Report, at J-3, while the benefit received by a Scientologist from auditing is a personal accommodation. If the perceived difference lies in the fact that Christians and Jews worship in congregations, whereas Scientologists, in a manner reminiscent of Eastern religions, see App. 78–83 (testimony of Dr. Thomas Love), gain awareness of the "immortal spiritual being" within them in one-to-one sessions with auditors, *ante*, at 684–685, such a distinction would raise serious Establishment Clause problems. See *Wallace* v. *Jaffree*, 472 U. S. 38, 69–70 (1985) (O'CONNOR, J., concurring in judgment); *Lynch* v. *Donnelly*, 465 U. S. 668, 687–689 (1984) (concurring opinion). The distinction is no more legitimate if it is based on the fact that congregational worship services "would be said anyway," Brief for Respondent 43, without the payment of a pew rental or stipend or tithe by a particular adherent. The relevant comparison between Scientology and other religions must be between the Scientologist undergoing auditing or training on one hand and the congregation on the other. For some religions the central importance of the congregation achieves legal dimensions. In Orthodox Judaism, for example, certain worship services cannot be performed and Scripture cannot be read publicly without the presence of at least 10 men. 12 Encyclopaedia Judaica, Minyan, p. 68 (1972). If payments for participation occurred in such a setting, would the benefit to the 10th man be only incidental while for the personal accommodation of the 11th? In the same vein, will the deductibility of a Mass stipend turn on whether there are other congregants to hear the Mass? And conversely, does the fact that the payment of a tithe by a Mormon is an absolute prerequisite to admission to the temple make that payment for admission a personal accommodation regardless of the size of the congregation?

Given the IRS' stance in these cases, it is an understatement to say that with respect to fixed payments for religious services "the line between the taxable and the immune has been drawn by an unsteady hand." *United States* v. *Allegheny County*, 322 U. S. 174, 176 (1944) (Jackson, J.). This is not a situation in which a governmental regulation "happens to coincide or harmonize with the tenets of some or all religions," *McGowan* v. *Maryland*, 366 U. S. 420, 442 (1961), but does not violate the Establishment Clause because it is founded on a neutral, secular basis. See *Bob Jones University* v. *United States*, 461 U. S. 574, 604, n. 30 (1983). Rather, it involves the differential application of a standard based on constitutionally impermissible differences drawn by the Government among religions. As such, it is best characterized as a case of the Government "put[ting] an imprimatur on [all but] one religion." *Gillette* v. *United States*, 401 U. S. 437, 450 (1971). That the Government may not do.

The Court attempts to downplay the constitutional difficulty created by the IRS' different treatment of other fixed payments for religious services by accepting the Solicitor General's invitation to let the IRS make case-specific *quid pro quo* determinations. See *ante*, at 702 ("The IRS' application of the 'contribution or gift' standard may be right or wrong with respect to these other faiths, or it may be right with respect to some religious practices and wrong with respect to others"). See also Brief for Respondent 41–42. As a practical matter, I do not think that this unprincipled approach will prove helpful. The Solicitor General was confident enough in his brief to argue that, "even without making a detailed factual inquiry," Mormon tithing does not involve a *quid pro quo* arrangement. *Id.*, at 43–44. At oral argument, however, the Deputy Solicitor General conceded that if it was mandatory, tithing would be distinguishable from the "ordinary case of church dues." Tr. of Oral Arg. 36–37. If the approach suggested by the Solicitor General is so malleable and indefinite, it is not a panacea and cannot be trusted to secure First Amendment rights against arbitrary incursions by the Government.

On a more fundamental level, the Court cannot abjure its responsibility to address serious constitutional problems by converting a violation of the Establishment Clause into an "administrative consistency argument," *ante*, at 703, with an inadequate record. It has chosen to ignore both longstanding, clearly articulated IRS practice, and the failure of respondent to offer any cogent, neutral explanation for the IRS' refusal to apply this practice to the Church of Scientology. Instead, the Court has pretended that whatever errors in application the IRS has committed are hidden from its gaze and will, in any event, be rectified in due time.

In my view, the IRS has misapplied its longstanding practice of allowing charitable contributions under § 170 in a way that violates the Establishment Clause. It has unconstitutionally refused to allow payments for the religious service of auditing to be deducted as charitable contributions in the same way it has allowed fixed payments to other religions to be deducted. Just as the Minnesota statute at issue in *Larson* v. *Valente*, 456 U. S. 228 (1982), discriminated against the Unification Church, the IRS' application of the *quid pro quo* standard here—and only here—discriminates against the Church of Scientology. I would reverse the decisions below.

MEAD CORP. *v.* TILLEY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87-1868. Argued February 22, 1989—Decided June 5, 1989

Under the Employee Retirement Income Security Act of 1974 (ERISA), the Pension Benefit Guaranty Corporation (PBGC) guarantees certain nonforfeitable benefits provided by qualified defined benefit pension plans. When an employer voluntarily terminates a single-employer defined benefit plan, all accrued benefits automatically vest, notwithstanding the plan's particular vesting provisions. Plan assets are then distributed to participants in accordance with a six-category allocation scheme set forth in § 4044(a), which requires that plan administrators first distribute nonforfeitable benefits guaranteed by the PBGC, §§ 4044 (a)(1–4); then "all other nonforfeitable benefits under the plan," § 4044 (a)(5); and finally "all other benefits under the plan." § 4044(a)(6). Any remaining funds may be recouped by the employer. § 4044(d)(1)(A). Respondents, five employees of the Lynchburg Foundry Company (Foundry), formerly a wholly owned subsidiary of petitioner Mead Corp. (Mead), were covered by the Mead Industrial Salaried Retirement Plan (Plan), a single-employer defined benefit plan funded entirely by the employer. Plan benefits included normal retirement benefits payable at age 65, early retirement benefits payable at age 55 but reduced for each year by which retirement preceded normal retirement age, and unreduced early retirement benefits available to participants who had 30 or more years of service and elected to retire after age 62. When Mead sold Foundry and terminated the Plan, it paid unreduced early retirement benefits only to those who had met both the age and years of service requirements for such benefits. Respondents—all under age 62—received pay equal to the present value of the normal retirement benefit to which they would have been entitled had they retired at age 65, a sum less than the present value of unreduced early retirement payments. After distribution, Mead recouped nearly $11 million in plan assets. Respondents filed a suit in Virginia state court, which was later removed to the Federal District Court, alleging, *inter alia*, that the failure to pay the present value of the unreduced early retirement benefits violated ERISA. The District Court granted Mead summary judgment, concluding that since early retirement benefits are not "accrued benefits" under ERISA, respondents were not entitled to any additional sums under the Plan, and that the remaining fund assets could revert to Mead.

The Court of Appeals reversed, holding that before plan assets may revert to an employer, § 4044(a)(6) requires payment of early retirement benefits to plan participants even if those benefits were not accrued at the time of termination.

Held:

1. Upon termination of a defined benefit plan, § 4044(a) does not require a plan administrator to pay plan participants unreduced early retirement benefits provided under the plan before residual assets may revert to an employer. Section 4044(a)(6) does not create benefit entitlements but simply provides for the orderly distribution of plan assets required by ERISA's provisions. Pp. 721–725.

(a) Neither § 4044(a)'s plain language nor its legislative history in any way indicates an intent to confer a right upon plan participants to recover benefits not provided for elsewhere. Contrary to respondents' argument—that contingent unreduced early retirement benefits, even if unaccrued, are benefits "under the plan" under category 6 and must be distributed before an employer can recoup residual assets—the "under the plan" language refers only to allocation of benefits provided by the terms of the terminated plan. That § 4044(a) is a distribution mechanism is also illustrated by ERISA's structure, since it is inconceivable that Title IV—which simply provides for insurance for benefits generated elsewhere—was designed to modify the carefully crafted provisions of Title I, which determine the employee's right to benefits. The PBGC, whose views are accepted in light of ERISA's language and legislative history, as well as the IRS and the Labor Department, agrees that category 6 is limited to benefits created elsewhere. Pp. 721–724.

(b) Respondents are also mistaken in their alternative statutory argument that because all accrued benefits vest upon plan termination, they are nonforfeitable benefits falling within category 5, and, thus, category 6 would serve no purpose if it did not cover forfeitable benefits such as those at issue. The PBGC has consistently maintained that, for the purposes of § 4044(a) allocation, the characterization of benefits as forfeitable or nonforfeitable depends upon their status before plan termination. Respondents' contrary interpretation cannot be squared with the plain meaning of the statute, since including both forfeitable and nonforfeitable benefits in category 5 would contravene the clear directive of the allocation scheme to give priority to nonforfeitable benefits. Pp. 724–725.

2. On remand for a determination whether respondents are entitled to damages based on either of their two alternative grounds for concluding that ERISA requires payment of unreduced early retirement benefits before surplus assets revert to the employer—that unreduced early retirement benefits may qualify as "accrued benefits" under ERISA,

and that such benefits may be "liabilities" within the meaning of § 4044(d)(1)(A)—the Court of Appeals should consider the views of the PBGC and the IRS. Pp. 725–726.

815 F. 2d 989, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 727.

Patrick F. McCartan argued the cause for petitioner. With him on the briefs were *Charles J. Faruki*, *Richard H. Sayler*, *Judith Boyers Gee*, *Keith Edward Hope*, *Leon E. Irish*, and *Glen D. Nager*.

Clifford L. Harrision argued the cause for respondents. With him on the brief were *Daniel D. Hamrick*, *James C. Turk, Jr.*, *R. Louis Harrison, Jr.*, *Robert T. Wandrei*, and *Edwin C. Stone*.*

JUSTICE MARSHALL delivered the opinion of the Court.

Today we decide whether, upon termination of a defined benefit plan, § 4044(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 1025, as amended, 29 U. S. C. § 1344(a) (1982 ed. and Supp. V), requires a plan administrator to pay plan participants unreduced early retirement benefits provided under the plan before residual assets may revert to an employer.

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*Briefs of *amici curiae* urging reversal were filed for the Pension Benefit Guaranty Corporation by *Gary M. Ford* and *Carol Connor Flowe;* for the American Academy of Actuaries by *Gary D. Simms;* for the American Paper Institute, Inc., by *Mark E. Brossman;* for the American Society of Pension Actuaries by *Chester J. Salkind;* for the Chamber of Commerce of the United States by *Robin S. Conrad;* and for the National Employee Benefits Institute by *Daniel B. Stone.*

Briefs of *amici curiae* urging affirmance were filed for the American Association of Retired Persons by *Christopher G. Mackaronis* and *Robert L. Liebross;* and for the American Federation of Labor and Congress of Industrial Organizations by *George B. Driesen* and *Laurence Gold.*

I

A

Congress enacted ERISA in 1974 in part to prevent plan terminations from depriving employees and their beneficiaries of anticipated benefits. 29 U. S. C. § 1001(a). Titles I and II provide requirements for plan participation, benefit accrual and vesting, and plan funding. Title III contains general administrative provisions. Title IV covers the termination of private pension plans, establishes a system of insurance for benefits provided by such plans, and creates a "body corporate" within the Department of Labor, the Pension Benefit Guaranty Corporation (PBGC), to administer that system. § 1302. The PBGC guarantees certain nonforfeitable benefits provided by qualified defined benefit pension plans. § 1322.[1]

A defined benefit plan is one which sets forth a fixed level of benefits. See § 1002(35). Contributions to a defined benefit plan are calculated on the basis of a number of actuarial assumptions about such things as employee turnover, mortality rates, compensation increases, and the rate of return on invested plan assets. See Stein, Raiders of the Corporate Pension Plan: The Reversion of Excess Plan Assets to the Employer, 5 Am. J. Tax Policy 117, 121–122, and n. 19 (1986).

When an employer voluntarily terminates a single-employer defined benefit plan, all accrued benefits automatically vest, notwithstanding the plan's particular vesting provisions. 26 U. S. C. § 411(d)(3). Title IV of ERISA requires that plan assets be distributed to participants in accordance with the six-tier allocation scheme set forth in § 4044(a), 29 U. S. C. § 1344(a). Section 4044(a) provides that plan administrators first distribute nonforfeitable benefits guaranteed by the

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[1] For purposes of Title IV, a "nonforfeitable benefit" means "a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of this chapter." 29 U. S. C. § 1301(a)(8).

PBGC, 29 U. S. C. §§ 1344(a)(1)–(4) (1982 ed. and Supp. V);[2] then "all other nonforfeitable benefits under the plan," § 1344(a)(5); and finally "all other benefits under the plan," § 1344(a)(6).[3] If the plan assets are not sufficient to cover the benefits in categories 1–4, the PBGC will make up the difference. § 1361. The employer must then reimburse the PBGC for the unfunded benefit liabilities. § 1362. If funds remain after "all liabilities of the plan to participants and their beneficiaries have been satisfied," they may be recouped by the employer. § 1344(d)(1)(A). Similarly, the Internal Revenue Code (Code) conditions favorable tax treatment of the plan on satisfaction of "all liabilities with respect to employees and their beneficiaries under the [plan]" before plan assets may be diverted to others. 26 U. S. C. § 401(a)(2).

B

Respondents B. E. Tilley, William L. Crotts, Chrisley H. Reed, J. C. Weddle, and William D. Goode were employees of the Lynchburg Foundry Company (Foundry), formerly a wholly owned subsidiary of petitioner Mead Corporation (Mead).[4] The five were covered by the Mead Industrial Products Salaried Retirement Plan (Plan). The Plan was funded entirely by Mead's contributions.

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[2] By assigning the nonforfeitable benefits guaranteed by the PBGC to the first four priority categories, the allocation scheme "protect[s] against evasion of the . . . limits on the [PBGC's] insurance benefits by use of pension fund assets to first pay uninsured benefits." S. Rep. No. 93–383, p. 84 (1973).

[3] Section 4044(a) provides in relevant part:

"Allocation of assets

"(a) Order of priority of participants and beneficiaries

"In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

"(1) First, to that portion of each individual's accured *[sic]* benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

"(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

"(3) Third, to [benefits that retired workers were receiving or could have received had the workers chosen to retire within the three years immediately prior to plan termination.

"(4) Fourth, to all other benefits guaranteed by the PBGC].

"(5) Fifth, to all other nonforfeitable benefits under the plan.

"(6) Sixth, to all other benefits under the plan."

As a single-employer defined benefit plan, the Plan set forth a fixed level of benefits for employees. Plan participants who completed 10 years of service attained a vested right to accrued benefits, that is, those benefits earned under the Plan. App. 30 (Plan, Art. I, § 13). These benefits included normal retirement benefits, payable at age 65 and calculated with reference to a participant's earnings and years of service. *Id.*, at 37–41 (Plan, Arts. IV, § 1(b), V). At age 55, participants were eligible for early retirement benefits, calculated in the same manner as normal retirement benefits, but reduced by five percent for each year by which a participant's retirement preceded the normal retirement age. *Id.*, at 37, 38–39 (Plan, Arts. IV, § 2, V, § 2(a)). A subsidized or unreduced early retirement benefit, *i. e.*, a benefit equal to that payable at age 65, was available to participants who had 30 or more years of service and elected to retire after age 62. *Id.*, at 39 (Plan, Art. V, § 2(b)). The Plan did not provide for any benefits payable solely upon plan termination.

In 1983, Mead sold Foundry and terminated the Plan.[5] Mead paid unreduced early retirement benefits only to those employees who had met both the age and years of service requirements. At the time Mead terminated the Plan, four respondents had over 30 years of credited service and a fifth had 28. None had reached age 62. Thus, each respondent received payment equal to the present value, determined as of the date of distribution, of the normal retirement benefit to which he would have been entitled had he retired at age 65.[6] Had Mead paid the present value of the unreduced early retirement benefits, each respondent would have received on average $9,000 more. App. to Brief for Respondents 1. After Mead finished distributing plan assets to plan participants, nearly $11 million remained in the Plan's fund. Mead recouped this money pursuant to Article XIII, § 4(f), of the Plan. App. 63.[7]

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[4] David H. Wall, another former employee of Mead, was also a party to this action, but he died while the action was pending in the District Court. This Court denied respondents' motion to substitute Richard H. Wall, executor of David H. Wall's estate, for David H. Wall. 488 U. S. 906 (1988).

[5] Mead sought approval of its proposed distribution of plan assets from the PBGC and the Internal Revenue Service (IRS), the two agencies responsible for enforcing ERISA. See 29 U. S. C. §§ 1341(a) and (b) (1982 ed., Supp. V). The PBGC replied that "[b]ased on the information [Mead] supplied . . . , the assets of this Plan will be sufficient as of [Mead's] proposed date of distribution to discharge when due all obligations of the Plan with respect to guaranteed benefits." App. to Pet. for Cert. 34a. The IRS issued a determination letter which stated that Mead's proposed plan termination would "not adversely affect its qualification for Federal tax

In 1984, respondents filed suit in the Circuit Court of the city of Radford, Virginia, alleging, *inter alia*, that the failure to pay the present value of the unreduced early retirement benefits violated ERISA, 29 U. S. C. §§ 1103(c), 1104(a)(1)(A), 1106(b), and 1344. Mead removed the case to the United States District Court for the Western District of Virginia. The District Court granted summary judgment in favor of Mead, concluding that "[t]he Plan's language, the legislative history, and the case law in the fourth circuit . . . clearly demonstrate that early retirement benefits are not 'accrued

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purposes" as long as plan assets were not "returned to [Mead] before the plan's liabilities to all plan participants are satisfied." *Id.*, at 30a–31a.

[6] Each respondent elected to receive his benefits in a lump sum rather than as an annuity. Tilley received $87,108.74; Wall $65,360.80; Crotts $87,552.03; Reed $69,882.45; Weddle $50,800.35; and Goode $83,923.93.

[7] Section 4(f) of the Plan provides, in relevant part:

"Any surplus remaining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan . . . , and after distribution of any released reserves . . . shall, subject to the pertinent provisions of federal or state law, be returnable to [Mead]." App. 63.

benefits' under ERISA." Civ. Action No. 84–0751 (WD Va., Apr. 18, 1986). It therefore held that respondents were not entitled to additional sums under the Plan and that the assets remaining in the fund could revert to Mead pursuant to 29 U. S. C. § 1344(d)(1) and Article XIII, § 4(f), of the Plan.

The Court of Appeals for the Fourth Circuit reversed. 815 F. 2d 989 (1987). Adopting the reasoning of the Court of Appeals for the Second Circuit in *Amato* v. *Western Union Int'l, Inc.*, 773 F. 2d 1402 (1985), cert. dism'd, 474 U. S. 1113 (1986), the court concluded that before plan assets may revert to an employer, § 4044(a)(6) requires payment of early retirement benefits to plan participants "even if those benefits were not accrued at the time of termination." 815 F. 2d, at 991. That conclusion, the court stated, was dictated by the language of the statute, its legislative history, and agency interpretation. *Id.*, at 992. Finally, the court provided a formula for determining respondents' damages and specified that the money should be paid in a lump sum.

Because the question decided by the Court of Appeals for the Fourth Circuit is an important one over which the Courts of Appeals have differed,[8] we granted certiorari. 488 U. S. 815 (1988). We now reverse.

II

Respondents concede that, at the time the Plan was terminated, they had not satisfied both the age and service requirements for unreduced early retirement benefits. Nevertheless, they claim that they are entitled to such benefits because, in their view, contingent early retirement benefits, even if unaccrued, are "benefits under the plan" under category 6, § 4044(a)(6), and therefore must be distributed before the employer can recoup any residual plan assets. Brief for Respondents 4.

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[8] See *Ashenbaugh* v. *Crucible Inc., 1975 Salaried Retirement Plan*, 854 F. 2d 1516, 1529 (CA3 1988), cert. pending, No. 88–897; *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 848 F. 2d 1164, 1178–1179 (CA11 1988) (en banc); *Amato* v. *Western Union Int'l, Inc.*, 773 F. 2d 1402, 1415–1416 (CA2 1985), cert. dism'd, 474 U. S. 1113 (1986).

We note preliminarily that the PBGC has flatly rejected respondents' argument. In the PBGC's view, § 4044(a) "does not create additional benefit entitlements. It merely provides for the orderly distribution of benefits already earned under the terms of a defined benefit plan or otherwise required at termination by other provisions of ERISA." Brief for PBGC as *Amicus Curiae* 9. The PBGC consistently has expressed this view in Opinion Letters addressing proposed plan terminations. See, *e. g.*, PBGC Opinion Letters Nos. 87–11 (Oct. 22, 1987); 86–5 (Mar. 6, 1986); 86–1 (Jan. 15, 1986). The Department of Labor and the IRS, the other agencies responsible for administering ERISA, agree that category 6 is limited to benefits created elsewhere. See PBGC, IRS, and Labor Department Guidelines on Asset Reversions, 11 BPR 724 (1984).

When we interpret a statute construed by the administering agency, we ask first "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; . . . [but] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council*, 467 U. S. 837, 842–843 (1984); see also *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 446–448 (1987). Thus, we turn first to the language of the statute. See, *e. g.*, *Blum* v. *Stenson*, 465 U. S. 886, 896 (1984); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980); *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U. S. 359, 373–374 (1980). Section 4044(a) in no way indicates an intent to confer a right upon plan participants to recover unaccrued benefits. On the contrary, the language of § 4044(a)(6)—"benefits *under the plan*"—can refer only to the allocation of benefits provided by the terms of the terminated plan. The limited function of § 4044(a) as an allocation mechanism is made clear by its introductory language, which reads: "In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order." Finally, any possible ambiguity is resolved against respondents by the title of § 4044(a)—"[a]llocation of assets." *FTC* v. *Mandel Bros., Inc.*, 359 U. S. 385, 388–389 (1959).

That § 4044(a) is a distribution mechanism and not a source for new entitlements also is illustrated by the structure of the statute. Title I of ERISA sets forth elaborate provisions to determine an employee's right to benefits. Those provisions describe in detail the accrual of benefits and the vesting of accrued benefits after service of a fixed number of years. Title IV, which contains § 4044(a), simply provides for insurance for benefits created elsewhere. It is inconceivable that this section was designed to modify the carefully crafted provisions of Title I.

To counter the plain language and clear structure of the statute, respondents rely heavily on legislative history. They contend that Congress' failure to include in category 6 the word "accrued," which appeared in a House version of the statute but did not survive the Conference Committee amendments, evinces an intent to require the provision of unaccrued as well as accrued benefits. We disagree. We do not attach decisive significance to the unexplained disappearance of one word from an unenacted bill because "mute intermediate legislative maneuvers" are not reliable indicators of congressional intent. *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 61 (1947); see also *Drummond Coal Co.* v. *Watt*, 735 F. 2d 469, 474 (CA11 1984). There is simply nothing in the legislative history suggesting that Congress intended § 4044(a) to be a source of benefit entitlements rather than an allocation scheme. Neither the House nor the Senate bill provided for allocation of assets on plan termination to benefits that were not created elsewhere.[9] Because the Conference Committee discussed fully the areas where ERISA altered prior law or where the final version of the statute differed from the predecessor bills,[10] it is reasonable to assume that had the Conference Committee intended to make § 4044(a) a source of benefit entitlements, it would have discussed the change in the Conference Report.

Respondents offer an alternative statutory argument. They suggest that because all accrued benefits vest upon plan termination pursuant to 26 U. S. C. § 411(d)(3), they are nonforfeitable benefits which fall within category 5 of the allocation scheme. Thus, they argue, if category 6 did not cover forfeitable benefits such as the contingent early retirement benefits at issue here, it would serve no purpose.

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[9] The final allocation scheme in the House bill consisted of four categories: (1) employee contributions; (2) present value of nonforfeitable benefits in pay status or for which a participant qualified on the date of plan termination; (3) present value of other nonforfeitable benefits; and (4) present value of "accrued benefit[s]" not payable under higher priority categories. H. R. 2, 93d Cong., 2d Sess., §§ 112(b)(1)–(b)(4) (1974) (as passed by the House on February 28, 1974), reprinted in 3 Legislative History, Employee Retirement Income Security Act (Committee Print compiled for the Senate Committee on Labor) 3957–3958 (1976) (Legislative History). If any assets remained after the satisfaction of these liabilities, the House bill provided for allocation of assets first to investment earnings on employee contributions and then to benefits payable solely upon plan termination. Only then could any remaining assets be recouped. §§ 112(d)(1)–(d)(3).

Although the Senate amendment to H. R. 2 provided for a much simpler allocation scheme, it too was limited to benefits required by the plan or by another ERISA provision: (1) voluntary employee contributions; (2) mandatory employee contributions; (3) benefits in pay status for at least three years; and (4) all other benefits guaranteed by the PBGC. H. R. 2, 93d Cong., 2d Sess., § 444 (1974) (as passed by the Senate on March 4, 1974), reprinted in 3 Legislative History 3720–3721. The Conference Committee adopted an allocation scheme proposed by the administration which "combine[d] the best features of the House and Senate bills." Administration Recommendations to the House and Senate Conferees on H. R. 2 to Provide for Pension Reform 60 (April 1974), reprinted in 3 Legislative History 5107. See also H. R. Conf. Rep. No. 93–1280, p. 375 (1974), reprinted in 3 Legislative History 4277, 4642.

[10] See, *e. g.*, H. R. Conf. Rep. No. 93–1280, pp. 268–282 (vesting), reprinted in 3 Legislative History 4535–4549; *id.*, at 306–323 (prohibited transactions), reprinted in 3 Legislative History 4573–4590; *id.*, at 355–356 (salary reduction plans), reprinted in 3 Legislative History 4622–4623.

Respondents are mistaken. The PBGC has consistently maintained that, for purposes of its guarantee and of asset allocation under § 4044(a), the characterization of benefits as forfeitable or nonforfeitable depends upon their status before plan termination. See 29 CFR §§ 2613.6(b) and 2618.2 (1987) ("[B]enefits that become nonforfeitable solely as a result of the termination of a plan [are] considered forfeitable"). Soon after the enactment of ERISA, the PBGC stated that "priority category 6 will contain the value of accrued forfeitable benefits of a participant." 40 Fed. Reg. 51370 (1975). Thus, according to the PBGC, category 6 provides for the allocation of benefits that are forfeitable before plan termination as well as benefits provided under the plan for payment solely upon plan termination. See 29 CFR § 2618.16 (1987). Respondents have failed to persuade us that the PBGC's views are unreasonable. On the contrary, it is respondents' interpretation which cannot be squared with the statute. For if category 5 included benefits that were forfeitable before plan termination as well as those that were nonforfeitable, there would be no guarantee that nonforfeitable benefits would be paid before forfeitable benefits in cases where plan assets are insufficient to cover both. This result would contravene the clear directive of the allocation scheme to give priority to nonforfeitable benefits.

III

We hold that § 4044(a)(6) does not create benefit entitlements but simply provides for the orderly distribution of plan assets required by the terms of a defined benefit plan or other provisions of ERISA. Because the Court of Appeals relied exclusively on § 4044(a)(6) as the grounds for respondents' entitlement to unreduced retirement benefits upon plan termination, we reverse that judgment. Respondents, however, offer two alternative grounds for concluding that ERISA requires payment of unreduced early retirement benefits before surplus assets revert to the employer: first, unreduced early retirement benefits may qualify as "accrued benefits" under ERISA; and, second, unreduced early retirement benefits may be "liabilities" within the meaning of § 4044(d)(1)(A), 29 U. S. C. § 1344(d)(1)(A). Because the Court of Appeals concluded that § 4044(a)(6) was a source of entitlement for unaccrued benefits, it did not reach these questions. We therefore remand for a determination whether respondents are entitled to damages on the basis of either of these alternative theories. In deciding these issues, the Court of Appeals should consider the views of the PBGC and the IRS. For a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to "embar[k] upon a voyage without a compass." *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 568 (1980).[11]

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[11] Although the parties and several *amici curiae* have discussed these alternative theories before this Court, the PBGC and the IRS have not. The PBGC filed a brief as *amicus curiae* in support of petitioner but specifically stated: "Like the Fourth Circuit, the PBGC expresses no view on the question, arising under Titles I and II of ERISA, whether early retirement benefits are accrued benefits." Brief for PBGC as *Amicus Curiae* 6, n. 3. The PBGC brief does not mention the § 4044(d)(1)(A) liabilities issue. The IRS did not file a brief before this Court. We are aware that the United States filed an *amicus curiae* brief on behalf of the IRS in *Amato* v. *Western Union Int'l, Inc.*, 773 F. 2d 1402 (CA2 1985), arguing that early retirement benefits are accrued benefits protected from elimination by plan amendment within the meaning of § 411(d)(6) of the Code. However, the parties and *amici curiae* disagree whether the IRS still holds this view. Compare Brief for Petitioner 32–33, and n. 27 ("Treasury Regulations issued in 1988 confirm the IRS's views that an early retirement subsidy is no part of the participant's accrued benefit"), with Brief for American Association of Retired Persons as *Amicus Curiae* 15 ("[T]he IRS has consistently interpreted the term accrued benefit to extend to the type of early retirement benefits at issue in this case"). Without the views of

Because § 4044(a)(6) is solely an allocation provision, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, dissenting.

Perhaps the Court is prudent to await the advice of the Solicitor General before deciding the principal question presented by this case. As presently advised, however, I am persuaded that the Court of Appeals reached the right conclusion, even though I agree with the Court that § 4044(a)(6) is not itself a source of retirement benefits.

In my opinion the early retirement benefits that respondents seek are contingent liabilities that under both ERISA and the Plan must be satisfied before plan assets revert to the employer. Section 4044(d) of ERISA provides that residual assets of a plan may revert to the employer only if three conditions are satisfied, including that "all liabilities of the plan to participants and their beneficiaries have been satisfied" and "the plan provides for such a distribution in these circumstances." 29 U. S. C. § 1344(d). Under the Plan, "[a]ny surplus remaining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan, . . . shall . . . be returnable to [Mead]." App. 63 (Plan, Art. XIII, § 4(f)). The term "liabilities," not defined in ERISA itself, is given meaning by a parallel provision in the Internal Revenue Code, 26 U. S. C. § 401(a)(2), which long has been interpreted to require a qualified plan to satisfy both contingent and fixed obligations before any of the plan's assets are diverted to any purpose other than the exclusive benefit of employees and

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the agencies responsible for enforcing ERISA or an opinion by the Court of Appeals, we are reluctant to address these complicated and important issues pertaining to the private pensions of millions of workers.

their beneficiaries.[1] Thus, as I understand it, the question in this case is whether early retirement benefits are contingent liabilities under ERISA or the Plan. The answer, I believe, is yes.

Respondents have far more than an expectancy interest in early retirement benefits. Although the benefits may not be "accrued" in the ERISA sense, respondents have earned them under the Plan by serving over 30 years with Mead, and their right to payment is contingent only upon their election to retire after reaching age 62.[2] Cf. *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 848 F. 2d 1164, 1174, n. 22 (CA11 1988) ("[A]n employee is entitled to expect that early retirement provisions in a plan will not be deleted by amendment shortly before the employee qualifies"). Their position is similar to that of those employees whose rights to earned benefits prior to ERISA were frustrated by backloaded accrual schedules and abrupt plan terminations. Respondents' rights have been frustrated by the unilateral action of petitioner. It was precisely to prevent such preemptive actions depriving employees with long years of employment of their anticipated retirement benefits that Congress passed ERISA. See *Nachman Corp.* v. *Pension Benefit Guaranty Corporation,* 446 U. S. 359, 374–375 (1980). Petitioner was required both by IRS rulings and by prudent actuarial practice to accumulate the funds necessary to pay early retirement benefits.[3] It is reasonable to require it to take account of the contingent rights to those benefits of employees who have satisfied the years of service requirement. I would construe contingent rights or liabilities to include respondents' rights to early retirement benefits upon reaching age 62. Accordingly, I would affirm the judgment of the Court of Appeals.

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[1] "The term 'liabilities' as used in section 401(a)(2) includes both fixed and contingent obligations to employees. For example, if 1,000 employees are covered by a trust forming part of a pension plan, 300 of whom have satisfied all the requirements for a monthly pension, while the remaining 700 employees have not yet completed the required period of service, contingent obligations to such 700 employees have nevertheless arisen which constitute 'liabilities' within the meaning of that term. It must be impossible for the employer (or other nonemployee) to recover any amounts other than such amounts as remain in the trust because of 'erroneous actuarial computations' after the satisfaction of all fixed and contingent obligations." Treas. Reg. § 1.401-2(b)(2), 26 CFR § 1.401-2(b)(2) (1988).

In explaining the statutory provisions of the Pension Protection Act, Pub. L. 100-203, Title IX, §§ 9302—9504, 101 Stat. 1330-333 to 1330-382, Congress in 1987 expressed a similar understanding that, under present law, a plan may be voluntarily terminated only "if it has sufficient assets to pay all benefit commitments under the plan" and that all benefits include "all fixed and contingent liabilities to plan participants and beneficiaries." H. R. Conf. Rep. No. 100-495, pp. 879, 884 (1987).

[2] The Plan provides:

"(b) If a participant with thirty (30) or more years of Credited Service elects to retire on or after he attains sixty-two (62) years of age, he shall be entitled to the Retirement Income provided under Section 1 of Article V without any reduction of benefits." App. 39 (Plan, Art. V, § 2(b)).

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[3] Under IRS rulings, if a plan has an early retirement benefit, the plan actuary is required to take the possibility of early retirement into account in deriving reasonable actuarial assumptions. See Rev. Rul. 78–331, 1978–2 Cum. Bull. 158; Internal Revenue Service Manual, Actuarial Guidelines Handbook, reprinted in 1 CCH Pension Plan Guide ¶ 3565, Ch. 520 (1986). See also R. Osgood, Law of Pensions and Profit-Sharing § 3.4.4, p. 96 (1984); 4 S. Young, Pension and Profit-Sharing Plans § 18.06[2], pp. 18–121 (1988); 5 *id.*, § 22[B].03[8], p. 22B.48.

COMMUNITY FOR CREATIVE NON-VIOLENCE ET AL. *v.* REID

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88–293. Argued March 29, 1989—Decided June 5, 1989

In the fall of 1985, petitioners—the Community for Creative Non-Violence (CCNV), a Washington, D. C., organization dedicated to eliminating homelessness, and one of its trustees—entered into an oral agreement with respondent Reid, a sculptor, to produce a statue dramatizing the plight of the homeless for display at a 1985 Christmas pageant in Washington. While Reid worked on the statue in his Baltimore, Md., studio, CCNV members visited him on a number of occasions to check on his progress and to coordinate CCNV's construction of the sculpture's base in accordance with the parties' agreement. Reid accepted most of CCNV's suggestions and directions as to the sculpture's configuration and appearance. After the completed work was delivered to Washington, CCNV paid Reid the final installment of the agreed-upon price, joined the sculpture to its base, and displayed it. The parties, who had never discussed copyright in the sculpture, then filed competing copyright registration certificates. The District Court ruled for CCNV in its subsequent suit seeking, *inter alia*, a determination of copyright ownership, holding that the statue was a "work made for hire" as defined in the Copyright Act of 1976, 17 U. S. C. § 101, and was therefore owned exclusively by CCNV under § 201(b), which vests copyright ownership of works for hire in the employer or other person for whom the work is prepared, unless there is a written agreement to the contrary. The Court of Appeals reversed, holding that the sculpture was not a "work made for hire" under the first subsection of the § 101 definition (hereinafter § 101(1)), since it was not "prepared by an employee within the scope of his or her employment" in light of Reid's status as an independent contractor under agency law. The court also ruled that the statue did not satisfy the second subsection of the § 101 definition (hereinafter § 101(2)), since sculpture is not one of the nine categories of "specially ordered or commissioned" works enumerated therein, and the parties had not agreed in writing that the sculpture would be a work for hire. However, the court remanded for a determination whether the statue was jointly authored by CCNV and Reid, such that they were co-owners of the copyright under § 201(a).

Held:

1. To determine whether a work is a "work made for hire" within the § 101 definition, a court should first apply general common law of agency principles to ascertain whether the work was prepared by an employee or an independent contractor, and, depending upon the outcome, should then apply either § 101(1) or § 101(2). Although the Act nowhere defines "employee," "employment," or related terms, it must be inferred that Congress meant them in their settled, common-law sense, since nothing in the text of the work for hire provisions indicates that those terms are used to describe anything other than the conventional relation of employer and employee. On the contrary, Congress' intent to incorporate agency law definitions is suggested by § 101(1)'s use of the term "scope of employment," a widely used agency law term of art. Moreover, the general common law of agency must be relied on, rather than the law of any particular State, since the Act is expressly intended to create a federal law of uniform, nationwide application by broadly preempting state statutory and common-law copyright regulation. Petitioners' argument that a work is "prepared by an employee within the scope of his or her employment" whenever the hiring party retains the right to control, or actually controls, the work is inconsistent with the language and legislative history of the work for hire provisions, and would distort the provisions' structure, which views works by employees and commissioned works by independent contractors as mutually exclusive entities. Pp. 737–751.

2. The sculpture in question is not a "work made for hire" within the meaning of § 101. Reid was an independent contractor rather than a § 101(1) "employee" since, although CCNV members directed enough of the work to ensure that the statue met their specifications, all other relevant circumstances weigh heavily against finding an employment relationship. Reid engages in a skilled occupation; supplied his own tools; worked in Baltimore without daily supervision from Washington; was retained for a relatively short period of time; had absolute freedom to decide when and how long to work in order to meet his deadline; and had total discretion in hiring and paying assistants. Moreover, CCNV had no right to assign additional projects to Reid; paid him in a manner in which independent contractors are often compensated; did not engage regularly in the business of creating sculpture or, in fact, in any business; and did not pay payroll or Social Security taxes, provide any employee benefits, or contribute to unemployment insurance or workers' compensation funds. Furthermore, as petitioners concede, the work in question does not satisfy the terms of § 101(2). Pp. 751–753.

3. However, CCNV nevertheless may be a joint author of the sculpture and, thus, a co-owner of the copyright under § 201(a), if, on remand,

the District Court determines that the parties prepared the work with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole. P. 753.

270 U. S. App. D. C. 26, 846 F. 2d 1485, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Robert Alan Garrett argued the cause for petitioners. With him on the briefs were *Terri A. Southwick* and *L. Barrett Boss*.

Joshua Kaufman argued the cause for respondent. With him on the brief was *Jeffrey B. O'Toole*.

Lawrence S. Robbins argued the cause for the Register of Copyrights as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Bryson, Deputy Solicitor General Merrill*, and *Ralph Oman*.*

JUSTICE MARSHALL delivered the opinion of the Court.

In this case, an artist and the organization that hired him to produce a sculpture contest the ownership of the copyright in that work. To resolve this dispute, we must construe the "work made for hire" provisions of the Copyright Act of 1976 (Act or 1976 Act), 17 U. S. C. §§ 101 and 201(b), and in particular, the provision in § 101, which defines as a "work made for hire" a "work prepared by an employee within the scope of his or her employment" (hereinafter § 101(1)).

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*Briefs of *amici curiae* urging reversal were filed for the Computer and Business Equipment Manufacturers Association et al. by *Richard Dannay* and *Morton David Goldberg;* for Intellectual Property Owners, Inc., by *Donald W. Banner* and *Herbert C. Wamsley;* and for Magazine Publishers of America, Inc., by *Slade R. Metcalf* and *Victor A. Kovner*.

Briefs of *amici curiae* urging affirmance were filed for the American Society of Magazine Photographers et al. by *Charles D. Ossola;* for The Professional Photographers of America, Inc., by *David Ladd, David E. Leibowitz, Bruce G. Joseph,* and *Thomas W. Kirby;* and for Volunteer Lawyers for the Arts, Inc., et al. by *Irwin Karp*.

Arthur J. Levine and *William L. LaFuze* filed a brief for the American Intellectual Property Law Association as *amicus curiae*.

I

Petitioners are the Community for Creative Non-Violence (CCNV), a nonprofit unincorporated association dedicated to eliminating homelessness in America, and Mitch Snyder, a member and trustee of CCNV. In the fall of 1985, CCNV decided to participate in the annual Christmastime Pageant of Peace in Washington, D. C., by sponsoring a display to dramatize the plight of the homeless. As the District Court recounted:

> "Snyder and fellow CCNV members conceived the idea for the nature of the display: a sculpture of a modern Nativity scene in which, in lieu of the traditional Holy Family, the two adult figures and the infant would appear as contemporary homeless people huddled on a streetside steam grate. The family was to be black (most of the homeless in Washington being black); the figures were to be life-sized, and the steam grate would be positioned atop a platform 'pedestal,' or base, within which special-effects equipment would be enclosed to emit simulated 'steam' through the grid to swirl about the figures. They also settled upon a title for the work—'Third World America'—and a legend for the pedestal: 'and still there is no room at the inn.'" 652 F. Supp. 1453, 1454 (DC 1987).

Snyder made inquiries to locate an artist to produce the sculpture. He was referred to respondent James Earl Reid, a Baltimore, Maryland, sculptor. In the course of two telephone calls, Reid agreed to sculpt the three human figures. CCNV agreed to make the steam grate and pedestal for the statue. Reid proposed that the work be cast in bronze, at a total cost of approximately $100,000 and taking six to eight months to complete. Snyder rejected that proposal because CCNV did not have sufficient funds, and because the statue had to be completed by December 12 to be included in the pageant. Reid then suggested, and Snyder agreed, that the sculpture would be made of a material known as "Design Cast 62," a synthetic substance that could meet CCNV's monetary and time constraints, could be tinted to resemble bronze, and could withstand the elements. The parties agreed that the project would cost no more than $15,000, not including Reid's services, which he offered to donate. The parties did not sign a written agreement. Neither party mentioned copyright.

After Reid received an advance of $3,000, he made several sketches of figures in various poses. At Snyder's request, Reid sent CCNV a sketch of a proposed sculpture showing the family in a crèchelike setting: the mother seated, cradling a baby in her lap; the father standing behind her, bending over her shoulder to touch the baby's foot. Reid testified that Snyder asked for the sketch to use in raising funds for the sculpture. Snyder testified that it was also for his approval. Reid sought a black family to serve as a model for the sculpture. Upon Snyder's suggestion, Reid visited a family living at CCNV's Washington shelter but decided that only their newly born child was a suitable model. While Reid was in Washington, Snyder took him to see homeless people living on the streets. Snyder pointed out that they tended to recline on steam grates, rather than sit or stand, in order to warm their bodies. From that time on, Reid's sketches contained only reclining figures.

Throughout November and the first two weeks of December 1985, Reid worked exclusively on the statue, assisted at various times by a dozen different people who were paid with funds provided in installments by CCNV. On a number of occasions, CCNV members visited Reid to check on his progress and to coordinate CCNV's construction of the base. CCNV rejected Reid's proposal to use suitcases or shopping bags to hold the family's personal belongings, insisting instead on a shopping cart. Reid and CCNV members did not discuss copyright ownership on any of these visits.

On December 24, 1985, 12 days after the agreed-upon date, Reid delivered the completed statue to Washington. There it was joined to the steam grate and pedestal prepared by CCNV and placed on display near the site of the pageant Snyder paid Reid the final installment of the $15,000. The statue remained on display for a month. In late January 1986, CCNV members returned it to Reid's studio in Baltimore for minor repairs. Several weeks later, Snyder began making plans to take the statue on a tour of several cities to raise money for the homeless. Reid objected, contending that the Design Cast 62 material was not strong enough to withstand the ambitious itinerary. He urged CCNV to cast the statue in bronze at a cost of $35,000, or to create a master mold at a cost of $5,000. Snyder declined to spend more of CCNV's money on the project.

In March 1986, Snyder asked Reid to return the sculpture. Reid refused. He then filed a certificate of copyright registration for "Third World America" in his name and announced plans to take the sculpture on a more modest tour than the one CCNV had proposed. Snyder, acting in his capacity as CCNV's trustee, immediately filed a competing certificate of copyright registration.

Snyder and CCNV then commenced this action against Reid and his photographer, Ronald Purtee,[1] seeking return of the sculpture and a determination of copyright ownership. The District Court granted a preliminary injunction, ordering the sculpture's return. After a 2-day bench trial, the District Court declared that "Third World America" was a "work made for hire" under § 101 of the Copyright Act and that Snyder, as trustee for CCNV, was the exclusive owner of the copyright in the sculpture. 652 F. Supp., at 1457. The court reasoned that Reid had been an "employee" of CCNV within the meaning of § 101(1) because CCNV was the motivating force in the statue's production. Snyder and other CCNV members, the court explained, "conceived the idea of a contemporary Nativity scene to contrast with the national celebration of the season," and "directed enough of [Reid's] effort to assure that, in the end, he had produced what they, not he, wanted." *Id.*, at 1456.

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[1] Purtee was named as a defendant but never appeared or claimed any interest in the statue.

The Court of Appeals for the District of Columbia Circuit reversed and remanded, holding that Reid owned the copyright because "Third World America" was not a work for hire. 270 U. S. App. D. C. 26, 35, 846 F. 2d 1485, 1494 (1988). Adopting what it termed the "literal interpretation" of the Act as articulated by the Fifth Circuit in *Easter Seal Society for Crippled Children & Adults of Louisiana, Inc.* v. *Playboy Enterprises*, 815 F. 2d 323, 329 (1987), cert. denied, 485 U. S. 981 (1988), the court read § 101 as creating "a simple dichotomy in fact between employees and independent contractors." 270 U. S. App. D. C., at 33, 846 F. 2d, at 1492. Because, under agency law, Reid was an independent contractor, the court concluded that the work was not "prepared by an employee" under § 101(1). *Id.*, at 35, 846 F. 2d, at 1494. Nor was the sculpture a "work made for hire" under the second subsection of § 101 (hereinafter § 101(2)): sculpture is not one of the nine categories of works enumerated in that subsection, and the parties had not agreed in writing that the sculpture would be a work for hire. *Ibid.* The court suggested that the sculpture nevertheless may have been jointly authored by CCNV and Reid, *id.*, at 36, 846 F. 2d, at 1495, and remanded for a determination whether the sculpture is indeed a joint work under the Act, *id.*, at 39–40, 846 F. 2d, at 1498–1499.

We granted certiorari to resolve a conflict among the Courts of Appeals over the proper construction of the "work made for hire" provisions of the Act.[2] 488 U. S. 940 (1988). We now affirm.

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[2] Compare *Easter Seal Society for Crippled Children & Adults of Louisiana, Inc.* v. *Playboy Enterprises*, 815 F. 2d 323 (CA5 1987), (agency law determines who is an employee under § 101), cert. denied, 485 U. S.

II

A

The Copyright Act of 1976 provides that copyright ownership "vests initially in the author or authors of the work." 17 U. S. C. § 201(a). As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection. § 102. The Act carves out an important exception, however, for "works made for hire."[3] If the work is for hire, "the employer or other person for whom the work was prepared is considered the author" and owns the copyright, unless there is a written agreement to the contrary. § 201(b). Classifying a work as "made for hire" determines not only the initial ownership of its copyright, but also the copyright's duration, § 302(c), and the owners' renewal rights, § 304(a), termination rights, § 203(a), and right to import certain goods bearing the copyright, § 601(b)(1). See 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 5.03 [A], pp. 5–10 (1988). The contours of the work for hire doctrine therefore carry profound significance for freelance creators—including artists, writers, photographers, designers, composers, and computer programmers—and for the publishing, advertising, music, and other industries which commission their works.[4]

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981 (1988), with *Brunswick Beacon, Inc.* v. *Schock-Hopchas Publishing Co.*, 810 F. 2d 410 (CA4 1987) (supervision and control standard determines who is an employee under § 101); *Evans Newton, Inc.* v. *Chicago Systems Software*, 793 F. 2d 889 (CA7) (same), cert. denied, 479 U. S. 949 (1986); and *Aldon Accessories Ltd.* v. *Spiegel, Inc.*, 738 F. 2d 548 (CA2) (same), cert. denied, 469 U. S. 982 (1984). See also *Dumas* v. *Gommerman*, 865 F. 2d 1093 (CA9 1989) (a multifactor formal, salaried employee test determines who is an employee under § 101).

[3] We use the phrase "work for hire" interchangeably with the more cumbersome statutory phrase "work made for hire."

[4] As of 1955, approximately 40 percent of all copyright registrations were for works for hire, according to a Copyright Office study. See Varmer, Works Made for Hire and On Commission, in Studies Prepared

Section 101 of the 1976 Act provides that a work is "for hire" under two sets of circumstances:

> "(1) a work prepared by an employee within the scope of his or her employment; or
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."[5]

Petitioners do not claim that the statue satisfies the terms of § 101(2). Quite clearly, it does not. Sculpture does not fit within any of the nine categories of "specially ordered or commissioned" works enumerated in that subsection, and no written agreement between the parties establishes "Third World America" as a work for hire.

The dispositive inquiry in this case therefore is whether "Third World America" is "a work prepared by an employee within the scope of his or her employment" under § 101(1). The Act does not define these terms. In the absence of such guidance, four interpretations have emerged. The first holds that a work is prepared by an employee whenever the hiring party[6] retains the right to control the product. See *Peregrine* v. *Lauren Corp.*, 601 F. Supp. 828, 829 (Colo. 1985); *Clarkstown* v. *Reeder*, 566 F. Supp. 137, 142 (SDNY

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for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, Study No. 13, 86th Cong., 2d Sess., 139, n. 49 (Comm. Print 1960) (hereinafter Varmer, Works Made for Hire). The Copyright Office does not keep more recent statistics on the number of work for hire registrations.

[5] Section 101 of the Act defines each of the nine categories of "specially ordered or commissioned" works.

[6] By "hiring party," we mean to refer to the party who claims ownership of the copyright by virtue of the work for hire doctrine.

1983). Petitioners take this view. Brief for Petitioners 15; Tr. of Oral Arg. 12. A second, and closely related, view is that a work is prepared by an employee under § 101(1) when the hiring party has actually wielded control with respect to the creation of a particular work. This approach was formulated by the Court of Appeals for the Second Circuit, *Aldon Accessories Ltd.* v. *Spiegel, Inc.*, 738 F. 2d 548, cert. denied, 469 U. S. 982 (1984), and adopted by the Fourth Circuit, *Brunswick Beacon, Inc.* v. *Schock-Hopchas Publishing Co.*, 810 F. 2d 410 (1987), the Seventh Circuit, *Evans Newton, Inc.* v. *Chicago Systems Software*, 793 F. 2d 889, cert. denied, 479 U. S. 949 (1986), and, at times, by petitioners, Brief for Petitioners 17. A third view is that the term "employee" within § 101(1) carries its common-law agency law meaning. This view was endorsed by the Fifth Circuit in *Easter Seal Society for Crippled Children & Adults of Louisiana, Inc.* v. *Playboy Enterprises*, 815 F. 2d 323 (1987), and by the Court of Appeals below. Finally, respondent and numerous *amici curiae* contend that the term "employee" only refers to "formal, salaried" employees. See, *e. g.*, Brief for Respondent 23–24; Brief for Register of Copyrights as *Amicus Curiae* 7. The Court of Appeals for the Ninth Circuit recently adopted this view. See *Dumas* v. *Gommerman*, 865 F. 2d 1093 (1989).

The starting point for our interpretation of a statute is always its language. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). The Act nowhere defines the terms "employee" or "scope of employment." It is, however, well established that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 329 (1981); see also *Perrin* v. *United States*, 444 U. S. 37, 42 (1979). In the past, when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. See, *e. g.*, *Kelley* v. *Southern Pacific Co.*, 419 U. S. 318, 322–323 (1974); *Baker* v. *Texas & Pacific R. Co.*, 359 U. S. 227, 228 (1959) *(per curiam)*; *Robinson* v. *Baltimore & Ohio R. Co.*, 237 U. S. 84, 94 (1915). Nothing in the text of the work for hire provisions indicates that Congress used the words "employee" and "employment" to describe anything other than "'the conventional relation of employer and employé.'" *Kelley*, *supra*, at 323, quoting *Robinson*, *supra*, at 94; cf. *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 124–132 (1944) (rejecting agency law conception of employee for purposes of the National Labor Relations Act where structure and context of statute indicated broader definition). On the contrary, Congress' intent to incorporate the agency law definition is suggested by § 101(1)'s use of the term, "scope of employment," a widely used term of art in agency law. See Restatement (Second) of Agency § 228 (1958) (hereinafter Restatement).

In past cases of statutory interpretation, when we have concluded that Congress intended terms such as "employee," "employer," and "scope of employment" to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms. See, *e. g.*, *Kelley*, 419 U. S., at 323–324, and n. 5; *id.*, at 332 (Stewart, J., concurring in judgment); *Ward* v. *Atlantic Coast Line R. Co.*, 362 U. S. 396, 400 (1960); *Baker*, *supra*, at 228. This practice reflects the fact that "federal statutes are generally intended to have uniform nationwide application." *Mississippi Band of Choctaw Indians* v. *Holyfield*, *ante*, at 43. Establishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the Act's express objective of creating national, uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation. See 17 U. S. C. § 301(a). We thus agree with the Court of Appeals that the term "employee" should be understood in light of the general common law of agency.

In contrast, neither test proposed by petitioners is consistent with the text of the Act. The exclusive focus of the right to control the product test on the relationship between the hiring party and the product clashes with the language of § 101(1), which focuses on the relationship between the hired and hiring parties. The right to control the product test also would distort the meaning of the ensuing subsection, § 101(2). Section 101 plainly creates two distinct ways in which a work can be deemed for hire: one for works prepared by employees, the other for those specially ordered or commissioned works which fall within one of the nine enumerated categories and are the subject of a written agreement. The right to control the product test ignores this dichotomy by transforming into a work for hire under § 101(1) any "specially ordered or commissioned" work that is subject to the supervision and control of the hiring party. Because a party who hires a "specially ordered or commissioned" work by definition has a right to specify the characteristics of the product desired, at the time the commission is accepted, and frequently until it is completed, the right to control the product test would mean that many works that could satisfy § 101(2) would already have been deemed works for hire under § 101(1). Petitioners' interpretation is particularly hard to square with § 101(2)'s enumeration of the nine specific categories of specially ordered or commissioned works eligible to be works for hire, *e. g.*, "a contribution to a collective work," "a part of a motion picture," and "answer material for a test." The unifying feature of these works is that they are usually prepared at the instance, direction, and risk of a publisher or producer.[7] By their very nature, therefore, these types of works would be works by an employee under petitioners' right to control the product test.

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[7] See Supplementary Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., Copyright Law Revision, pt. 6, pp. 66–67 (H. R. Judiciary Comm.

The actual control test, articulated by the Second Circuit in *Aldon Accessories*, fares only marginally better when measured against the language and structure of § 101. Under this test, independent contractors who are so controlled and supervised in the creation of a particular work are deemed "employees" under § 101(1). Thus work for hire status under § 101(1) depends on a hiring party's *actual* control of, rather than *right to* control, the product. *Aldon Accessories*, 738 F. 2d, at 552. Under the actual control test, a work for hire could arise under § 101(2), but not under § 101(1), where a party commissions, but does not actually control, a product which falls into one of the nine enumerated categories. Nonetheless, we agree with the Court of Appeals for the Fifth Circuit that "[t]here is simply no way to milk the 'actual control' test of *Aldon Accessories* from the language of the statute." *Easter Seal Society*, 815 F. 2d, at 334. Section 101 clearly delineates between works prepared by an employee and commissioned works. Sound though other distinctions might be as a matter of copyright policy, there is no statutory support for an additional dichotomy between commissioned works that are actually controlled and supervised by the hiring party and those that are not.

We therefore conclude that the language and structure of § 101 of the Act do not support either the right to control the product or the actual control approaches.[8] The structure of

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Print 1965) (hereinafter Supplementary Report); Hardy, Copyright Law's Concept of Employment—What Congress Really Intended, 35 J. Copr. Soc. USA 210, 244–245 (1988).

[8] We also reject the suggestion of respondent and *amici* that the § 101(1) term "employee" refers only to formal, salaried employees. While there is some support for such a definition in the legislative history, see Varmer, Works Made for Hire 130; n. 11, *infra*, the language of § 101(1) cannot support it. The Act does not say "formal" or "salaried" employee, but simply "employee." Moreover, respondent and those *amici* who endorse a formal, salaried employee test do not agree upon the content of this test. Com-

§ 101 indicates that a work for hire can arise through one of two mutually exclusive means, one for employees and one for independent contractors, and ordinary canons of statutory interpretation indicate that the classification of a particular hired party should be made with reference to agency law.

This reading of the undefined statutory terms finds considerable support in the Act's legislative history. Cf. *Diamond* v. *Chakrabarty*, 447 U. S. 303, 315 (1980). The Act, which almost completely revised existing copyright law, was the product of two decades of negotiation by representatives of creators and copyright-using industries, supervised by the Copyright Office and, to a lesser extent, by Congress. See *Mills Music, Inc.* v. *Snyder*, 469 U. S. 153, 159 (1985); Litman, Copyright, Compromise, and Legislative History, 72 Cornell L. Rev. 857, 862 (1987). Despite the lengthy history of negotiation and compromise which ultimately produced the Act, two things remained constant. First, interested parties and Congress at all times viewed works by employees and commissioned works by independent contractors as separate entities. Second, in using the term "employee," the parties and Congress meant to refer to a hired party in a conventional employment relationship. These factors militate in favor of the reading we have found appropriate.

In 1955, when Congress decided to overhaul copyright law, the existing work for hire provision was § 62 of the 1909 Copyright Act, 17 U. S. C. § 26 (1976 ed.) (1909 Act). It provided that "the word 'author' shall include an employer in

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pare, *e. g.*, Brief for Respondent 37 (hired party who is on payroll is an employee within § 101(1)) with Tr. of Oral Arg. 31 (hired party who receives a salary or commissions regularly is an employee within § 101(1)); and Brief for Volunteer Lawyers for the Arts, Inc., et al. as *Amici Curiae* 4 (hired party who receives a salary *and* is treated as an employee for Social Security and tax purposes is an employee within § 101(1)). Even the one Court of Appeals to adopt what it termed a formal, salaried employee test in fact embraced an approach incorporating numerous factors drawn from the agency law definition of employee which we endorse. See *Dumas*, 865 F. 2d, at 1104.

the case of works made for hire."[9] Because the 1909 Act did not define "employer" or "works made for hire," the task of shaping these terms fell to the courts. They concluded that the work for hire doctrine codified in § 62 referred only to works made by employees in the regular course of their employment. As for commissioned works, the courts generally presumed that the commissioned party had impliedly agreed to convey the copyright, along with the work itself, to the hiring party. See, *e. g.*, *Shapiro, Bernstein & Co.* v. *Jerry Vogel Music Co.*, 221 F. 2d 569, 570, rev'd, 223 F. 2d 252 (CA2 1955); *Yardley* v. *Houghton Mifflin Co.*, 108 F. 2d 28, 31 (CA2 1939), cert. denied, 309 U. S. 686 (1940).[10]

In 1961, the Copyright Office's first legislative proposal retained the distinction between works by employees and works by independent contractors. See Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law, 87th Cong., 1st Sess., Copyright Law Revision 86–87 (H. R. Judiciary Comm. Print 1961). After numerous meetings with representatives of the affected parties, the Copyright Office issued a preliminary draft bill in 1963. Adopting the Register's recommendation, it defined "work made for hire" as "a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission." Preliminary Draft for Revised U. S. Copyright Law and Discussions and Comments on the Draft, 88th Cong., 2d Sess., Copyright Law Revision, Part 3, p. 15, n. 11 (H. R. Judiciary Comm. Print 1964) (hereinafter Preliminary Draft).

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[9] The concept of works made for hire first arose in controversies over copyright ownership involving works produced by persons whom all parties agreed were employees. See, *e. g.*, *Colliery Engineer Co.* v. *United Correspondence Schools Co.*, 94 F. 152 (CC SDNY 1899); *Little* v. *Gould*, 15 F. Cas. 612 (No. 8,395) (CC NDNY 1852). This Court first took note of the work for hire doctrine in *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, 248 (1903), where we found that an employer owned the copyright to advertisements that had been created by an employee in the course of his employment. *Bleistein* did not, however, purport to define "employee."

[10] See Varmer, Works Made for Hire 130; Fidlow, The "Works Made for Hire" Doctrine and the Employee/Independent Contractor Dichotomy: The Need for Congressional Clarification, 10 Hastings Comm. Ent. L. J. 591, 600–601 (1988). Indeed, the Varmer study, which was commissioned by Congress as part of the revision process, itself contained separate subsections labeled "Works Made for Hire" and "Works Made on Commission." It nowhere indicated that the two categories might overlap or that commissioned works could be made by an employee.

In response to objections by book publishers that the preliminary draft bill limited the work for hire doctrine to "employees,"[11] the 1964 revision bill expanded the scope of the work for hire classification to reach, for the first time, commissioned works. The bill's language, proposed initially by representatives of the publishing industry, retained the definition of work for hire insofar as it referred to "employees," but added a separate clause covering commissioned works, without regard to the subject matter, "if the parties so agree in writing." S. 3008, H. R. 11947, H. R. 12354, 88th Cong., 2d Sess., § 54 (1964), reproduced in 1964 Revision Bill with Discussions and Comments, 89th Cong., 1st Sess., Copyright Law Revision, pt. 5, p. 31 (H. R. Judiciary Comm. Print 1965). Those representing authors objected that the added provision would allow publishers to use their superior bargaining position to force authors to sign work for hire agreements, thereby relinquishing all copyright rights as a condition of getting their books published. See Supplementary Report, at 67.

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[11] See, *e. g.*, Preliminary Draft, at 259 (statement of Horace S. Manges, Joint Committee of the American Book Publishers Council and the American Textbook Publishers Institute) ("There would be a necessity of putting people on the payroll whom the employers wouldn't want to put on the payroll, and where the employees would prefer to work as independent contractors"); *id.*, at 272 (statement of Saul N. Rittenberg, MGM) ("[T]he present draft has given more emphasis to formalism than necessary. If I commission a work from a man, ordering a work specially for my purposes, and I pay for it, what difference does it make whether I put him under an employment contract or establish an independent contractor relationship?"); *id.*, at 260 (statement of John R. Peterson, American Bar Association) ("I don't think there is any valid philosophical or economic difference between the situation in which you have a man on a continuing basis of orders which justifies placing him on your payroll, and the situation in which you give him a particular order for a particular job").

In 1965, the competing interests reached a historic compromise, which was embodied in a joint memorandum submitted to Congress and the Copyright Office,[12] incorporated into the 1965 revision bill, and ultimately enacted in the same form and nearly the same terms 11 years later, as § 101 of the 1976 Act. The compromise retained as subsection (1) the language referring to "a work prepared by an employee within the scope of his employment." However, in exchange for concessions from publishers on provisions relating to the termination of transfer rights, the authors consented to a second subsection which classified four categories of commissioned works as works for hire if the parties expressly so agreed in writing: works for use "as a contribution to a collective work, as a part of a motion picture, as a translation, or as supplementary work." S. 1006, H. R. 4347, H. R. 5680, H. R. 6835, 89th Cong., 1st Sess., § 101 (1965). The interested parties selected these categories because they concluded that these commissioned works, although not prepared by employees and thus not covered by the first subsection, nevertheless should be treated as works for hire because they were ordinarily prepared "at the instance, direction, and risk of a publisher or producer." Supplementary Report, at 67. The Supplementary Report emphasized that only the "four special cases specifically mentioned" could qualify as works made for hire; "[o]ther works made on special order or commission would not come within the definition." *Id.*, at 67–68.

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[12] The parties to the joint memorandum included representatives of the major competing interests involved in the copyright revision process: publishers and authors, composers, and lyricists. See Copyright Law Revision: Hearings on H. R. 4347, 5680, 6831, 6835 before Subcommittee No. 3 of the House Committee on the Judiciary, 89th Cong., 1st Sess., pt. 1, p. 134 (1965).

In 1966, the House Committee on the Judiciary endorsed this compromise in the first legislative Report on the revision bills. See H. R. Rep. No. 2237, 89th Cong., 2d Sess., 114, 116 (1966). Retaining the distinction between works by employees and commissioned works, the House Committee focused instead on "how to draw a statutory line between those works written on special order or commission that should be considered as works made for hire, and those that should not." *Id.*, at 115. The House Committee added four other enumerated categories of commissioned works that could be treated as works for hire: compilations, instructional texts, tests, and atlases. *Id.*, at 116. With the single addition of "answer material for a test," the 1976 Act, as enacted, contained the same definition of works made for hire as did the 1966 revision bill, and had the same structure and nearly the same terms as the 1966 bill.[13] Indeed, much of the language of the 1976 House and Senate Reports was borrowed from the Reports accompanying the earlier drafts. See, *e. g.*, H. R. Rep. No. 94–1476, p. 121 (1976); S. Rep. No. 94–473, p. 105 (1975).

Thus, the legislative history of the Act is significant for several reasons. First, the enactment of the 1965 compromise with only minor modifications demonstrates that Congress intended to provide two mutually exclusive ways for works to acquire work for hire status: one for employees and the other for independent contractors. Second, the legislative history underscores the clear import of the statutory language: only enumerated categories of commissioned works may be accorded work for hire status. The hiring party's right to control the product simply is not determinative. See Note, The Creative Commissioner: Commissioned Works Under the Copyright Act of 1976, 62 N. Y. U. L. Rev. 373, 388 (1987). Indeed, importing a test based on a hiring party's right to control, or actual control of, a product would unravel the "'carefully worked out compromise aimed at balancing legitimate interests on both sides.'" H. R. Rep. No. 2237, *supra*, at 114, quoting Supplemental Report, at 66.[14]

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[13] An attempt to add "photographic or other portrait[s]," S. Rep. No. 94–473, p. 4 (1975), to the list of commissioned works eligible for work for hire status failed after the Register of Copyrights objected:

"The addition of portraits to the list of commissioned works that can be made into 'works made for hire' by agreement of the parties is difficult to justify. Artists and photographers are among the most vulnerable and poorly protected of all the beneficiaries of the copyright law, and it seems clear that, like serious composers and choreographers, they were not intended to be treated as 'employees' under the carefully negotiated definition in section 101." Second Supplementary Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law: 1975 Revision Bill, Chapter XI, pp. 12–13.

We do not find convincing petitioners' contrary interpretation of the history of the Act. They contend that Congress, in enacting the Act, meant to incorporate a line of cases decided under the 1909 Act holding that an employment relationship exists sufficient to give the hiring party copyright ownership whenever that party has the right to control or supervise the artist's work. See, *e. g.*, *Siegel* v. *National Periodical Publications, Inc.*, 508 F. 2d 909, 914 (CA2 1974); *Picture Music, Inc.* v. *Bourne, Inc.*, 457 F. 2d 1213, 1216 (CA2), cert. denied, 409 U. S. 997 (1972); *Scherr* v. *Universal Match Corp.*, 417 F. 2d 497, 500 (CA2 1969), cert. denied, 397 U. S. 936 (1970); *Brattleboro Publishing Co.* v. *Winmill Publishing Corp.*, 369 F. 2d 565, 567–568 (CA2 1966). In support of this position, petitioners note: "Nowhere in the 1976 Act or in the Act's legislative history does Congress state that it intended to jettison the control standard or otherwise to reject the pre-Act judicial approach to identifying a work for hire employment relationship." Brief for Petitioners 20, citing *Aldon Accessories*, 738 F. 2d, at 552.

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[14] Strict adherence to the language and structure of the Act is particularly appropriate where, as here, a statute is the result of a series of carefully crafted compromises. See *Rodriguez* v. *Compass Shipping Co.*, 451 U. S. 596, 617 (1981); *United States* v. *Sisson*, 399 U. S. 267, 291, 298 (1970).

We are unpersuaded. Ordinarily, "Congress' silence is just that—silence." *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 686 (1987). Petitioners' reliance on legislative silence is particularly misplaced here because the text and structure of § 101 counsel otherwise. See *Bourjaily* v. *United States*, 483 U. S. 171, 178 (1987); *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 592 (1980).[15] Furthermore, the structure of the work for hire provisions was fully developed in 1965, and the text was agreed upon in essentially final form by 1966. At that time, however, the courts had applied the work for hire doctrine under the 1909 Act exclusively to traditional employees. Indeed, it was not until after the 1965 compromise was forged and adopted by Congress[16] that a federal court for the first time applied the work for hire doctrine to commissioned works. See, *e. g.*, *Brattleboro Publishing Co.*, *supra*, at 567–568. Congress certainly could not have "jettisoned" a line of cases that had not yet been decided.

Finally, petitioners' construction of the work for hire provisions would impede Congress' paramount goal in revising the 1976 Act of enhancing predictability and certainty of copyright ownership. See H. R. Rep. No. 94–1476, *supra*, at 129. In a "copyright marketplace," the parties negotiate with an expectation that one of them will own the copyright in the completed work. *Dumas*, 865 F. 2d, at 1104–1105,

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[15] In framing other provisions of the Act, Congress indicated when it intended to incorporate existing case law. See, *e. g.*, H. R. Rep. No. 94–1476, p. 121 (1976) ("There is . . . no need for a specific statutory provision concerning the rights and duties of the coowners *[sic]* of a work; court-made law on this point is left undisturbed"); S. Rep. No. 94–473, *supra*, at 104 (same).

[16] Over the course of the copyright revision process, Congress frequently endorsed a negotiated compromise which years later in 1976 it formally enacted with only minor revisions. See *Mills Music, Inc.* v. *Snyder*, 469 U. S. 153, 160–161 (1985).

n. 18. With that expectation, the parties at the outset can settle on relevant contractual terms, such as the price for the work and the ownership of reproduction rights.

To the extent that petitioners endorse an actual control test,[17] CCNV's construction of the work for hire provisions prevents such planning. Because that test turns on whether the hiring party has closely monitored the production process, the parties would not know until late in the process, if not until the work is completed, whether a work will ultimately fall within § 101(1). Under petitioners' approach, therefore, parties would have to predict in advance whether the hiring party will sufficiently control a given work to make it the author. "If they guess incorrectly, their reliance on 'work for hire' or an assignment may give them a copyright interest that they did not bargain for." *Easter Seal Society*, 815 F. 2d, at 333; accord, *Dumas*, *supra*, at 1103. This understanding of the work for hire provisions clearly thwarts Congress' goal of ensuring predictability through advance planning. Moreover, petitioners' interpretation "leaves the door open for hiring parties, who have failed to get a full assignment of copyright rights from independent contractors falling outside the subdivision (2) guidelines, to unilaterally obtain work-made-for-hire rights years after the work has been completed as long as they directed or supervised the work, a standard that is hard not to meet when one is a hiring party." Hamilton, Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice, 135 U. Pa. L. Rev. 1281, 1304 (1987).

In sum, we must reject petitioners' argument. Transforming a commissioned work into a work by an employee on the basis of the hiring party's right to control, or actual control of, the work is inconsistent with the language, structure, and legislative history of the work for hire provisions. To determine whether a work is for hire under the Act, a court first should ascertain, using principles of general common law of agency, whether the work was prepared by an employee or an independent contractor. After making this determination, the court can apply the appropriate subsection of § 101.

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[17] Petitioners concede that, as a practical matter, it is often difficult to demonstrate the existence of a right to control without evidence of the actual exercise of that right. See *Murray* v. *Gelderman*, 566 F. 2d 1307, 1310–1311 (CA5 1978).

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We turn, finally, to an application of § 101 to Reid's production of "Third World America." In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.[18] Among the other factors relevant to this inquiry are the skill required;[19] the source of the instrumentalities and tools;[20] the location of the work;[21] the duration of the relationship between the parties;[22] whether the hiring party has the right to assign additional projects to the hired party;[23] the extent of the hired party's discretion over when and how long to work;[24] the method of payment;[25] the hired party's role in hiring and paying assistants;[26] whether the work is part of the regular business of the hiring party;[27] whether the hiring party is in business;[28] the provision of employee benefits;[29] and the tax treatment of the hired party.[30] See Restatement § 220(2) (setting forth a nonexhaustive list of factors relevant to determining whether a hired party is an employee).[31] No one of these factors is determinative. See *Ward*, 362 U. S., at 400; *Hilton Int'l Co.* v. *NLRB*, 690 F. 2d 318, 321 (CA2 1982).

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[18] See, *e. g., Hilton Int'l Co.* v. *NLRB*, 690 F. 2d 318, 320 (CA2 1982); *NLRB* v. *Maine Caterers, Inc.*, 654 F. 2d 131, 133 (CA1 1981), cert denied, 455 U. S. 940 (1982); Restatement § 220(1).

[19] See, *e. g., Bartels* v. *Birmingham*, 332 U. S. 126, 132 (1947); *Hilton Int'l Co., supra*, at 320; *NLRB* v. *A. Duie Pyle, Inc.*, 606 F. 2d 379, 382 (CA3 1979); Restatement § 220(2)(d).

[20] See, *e. g., NLRB* v. *United Ins. Co. of America*, 390 U. S. 254, 258 (1968); *United States* v. *Silk*, 331 U. S. 704, 717, 718 (1947); *Dumas*, 865 F. 2d, at 1105; Restatement § 220(2)(e).

[21] See, *e. g., United Ins. Co., supra*, at 258; *Dumas, supra*, at 1105; *Darden* v. *Nationwide Mutual Ins. Co.*, 796 F. 2d 701, 705 (CA4 1986); Restatement § 220(2)(e).

[22] See, *e. g., United Ins. Co., supra*, at 259; *Bartels, supra*, at 132; Restatement § 220(2)(f).

[23] See, *e. g., Dumas, supra*, at 1105.

[24] See, *e. g., United Ins. Co., supra*, at 258; *Short* v. *Central States, Southeast & Southwest Areas Pension Fund*, 729 F. 2d 567, 574 (CA8 1984).

[25] See, *e. g., Dumas, supra*, at 1105; *Darden, supra*, at 705; *Holt* v. *Winpisinger*, 258 U. S. App. D. C. 343, 351, 811 F. 2d 1532, 1540 (1987); Restatement § 220(2)(g).

Examining the circumstances of this case in light of these factors, we agree with the Court of Appeals that Reid was not an employee of CCNV but an independent contractor. 270 U. S. App. D. C., at 35, n. 11, 846 F. 2d, at 1494, n. 11. True, CCNV members directed enough of Reid's work to ensure that he produced a sculpture that met their specifications. 652 F. Supp., at 1456. But the extent of control the hiring party exercises over the details of the product is not dispositive. Indeed, all the other circumstances weigh heavily against finding an employment relationship. Reid is a sculptor, a skilled occupation. Reid supplied his own tools. He worked in his own studio in Baltimore, making daily supervision of his activities from Washington practicably impossible. Reid was retained for less than two months, a relatively short period of time. During and after this time, CCNV had no right to assign additional projects to Reid. Apart from the deadline for completing the sculpture, Reid had absolute freedom to decide when and how long to work. CCNV paid Reid $15,000, a sum dependent on "completion of a specific job, a method by which independent contractors are often compensated." *Holt* v. *Winpisinger*, 258 U. S. App. D. C. 343, 351, 811 F. 2d 1532, 1540 (1987). Reid had total discretion in hiring and paying assistants. "Creating sculptures was hardly 'regular business' for CCNV." 270 U. S. App. D. C., at 35, n. 11, 846 F. 2d, at 1494, n. 11. Indeed, CCNV is not a business at all. Finally, CCNV did not pay payroll or Social Security taxes, provide any employee benefits, or contribute to unemployment insurance or workers' compensation funds.

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[26] See, *e. g.*, *Bartels*, *supra*, at 132; *Silk*, *supra*, at 719; *Darden*, *supra*, at 705; *Short*, *supra*, at 574.

[27] See, *e. g.*, *United Ins. Co.*, *supra*, at 259; *Silk*, *supra*, at 718; *Dumas*, *supra*, at 1105; *Hilton Int'l Co.*, *supra*, at 321; Restatement § 220(2)(h).

[28] See, *e. g.*, Restatement § 220(2)(j).

[29] See, *e. g.*, *United Ins. Co.*, *supra*, at 259; *Dumas*, *supra*, at 1105; *Short*, *supra*, at 574.

[30] See, *e. g.*, *Dumas*, *supra*, at 1105.

[31] In determining whether a hired party is an employee under the general common law of agency, we have traditionally looked for guidance to the Restatement of Agency. See, *e. g.*, *Kelley* v. *Southern Pacific Co.*, 419 U. S. 318, 323–324, and n. 5 (1974); *id.*, at 332 (Stewart, J., concurring in judgment); *Ward* v. *Atlantic Coast Line R. Co.*, 362 U. S. 396, 400 (1960); *Baker* v. *Texas & Pacific R. Co.*, 359 U. S. 227, 228 (1959).

Because Reid was an independent contractor, whether "Third World America" is a work for hire depends on whether it satisfies the terms of § 101(2). This petitioners concede it cannot do. Thus, CCNV is not the author of "Third World America" by virtue of the work for hire provisions of the Act. However, as the Court of Appeals made clear, CCNV nevertheless may be a joint author of the sculpture if, on remand, the District Court determines that CCNV and Reid prepared the work "with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U. S. C. § 101.[32] In that case, CCNV and Reid would be co-owners of the copyright in the work. See § 201(a).

For the aforestated reasons, we affirm the judgment of the Court of Appeals for the District of Columbia Circuit.

It is so ordered.

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[32] Neither CCNV nor Reid sought review of the Court of Appeals' remand order. We therefore have no occasion to pass judgment on the applicability of the Act's joint authorship provisions to this case.

TOMPKINS *v.* TEXAS

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 87-6405. Argued December 6, 1988—Decided June 5, 1989

774 S. W. 2d 195, affirmed by an equally divided Court.

Emmett B. Lewis argued the cause for petitioner. With him on the briefs were *Robert K. Huffman* and *James B. Altman.*

Charles A. Palmer, Assistant Attorney General of Texas, argued the cause for respondent.. With him on the brief were *Jim Mattox*, Attorney General, *Mary F. Keller*, First Assistant Attorney General, *Lou McCreary*, Executive Assistant Attorney General, and *Michael P. Hodge* and *Margaret Portman Griffey*, Assistant Attorneys General.*

PER CURIAM.

The judgment below is affirmed by an equally divided Court.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *John A. Powell*, *Julius LeVonne Chambers*, and *Charles Stephen Ralston;* and for the Lawyers' Committee for Civil Rights Under Law by *Robert E. Montgomery, Jr.*, *Conrad K. Harper*, *Stuart J. Land*, *Norman Redlich*, *William L. Robinson*, and *Judith A. Winston.*

MARTIN ET AL. *v.* WILKS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 87-1614. Argued January 18, 1989—Decided June 12, 1989*

Black individuals and a branch of the National Association for the Advancement of Colored People brought actions in Federal District Court against the city of Birmingham, Alabama, and the Jefferson County Personnel Board (Board), alleging that the defendants had engaged in racially discriminatory hiring and promotion practices in violation of Title VII of the Civil Rights Act of 1964 and other federal law. Consent decrees were eventually entered that included goals for hiring blacks as firefighters and for promoting them. Respondent white firefighters subsequently brought suit in the District Court against the city and the Board, alleging that, because of their race, they were being denied promotions in favor of less qualified blacks in violation of federal law. They argued that the city and the Board were making promotion decisions on the basis of race in reliance on the consent decrees, and that those decisions constituted impermissible racial discrimination. After trial, the District Court granted the defendants' motion to dismiss. It held that respondents were precluded from challenging employment decisions taken pursuant to the consent decrees, even though they had not been parties to the proceedings in which the decrees were entered. The Court of Appeals reversed, rejecting the "impermissible collateral attack" doctrine that immunizes parties to a consent decree from discrimination charges by nonparties for actions taken pursuant to the decree.

Held: Respondents are not precluded from challenging the employment decisions taken pursuant to the consent decrees. Pp. 761–769.

(a) "[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry* v. *Lee*, 311 U. S. 32, 40. Pp. 761–762.

(b) Under ordinary application of the Federal Rules of Civil Procedure, a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined. Rule 24, governing intervention, is cast in permissive terms. Rule 19(a) provides for mandatory

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*Together with No. 87-1639, *Personnel Board of Jefferson County, Alabama, et al.* v. *Wilks et al.*, and No. 87-1668, *Arrington et al.* v. *Wilks et al.*, also on certiorari to the same court.

joinder in circumstances where a judgment rendered in the absence of a person may "leave . . . persons already parties subject to a substantial risk of incurring . . . inconsistent allegations," and Rule 19(b) sets forth the factors to be considered by a court in deciding whether to allow an action to proceed in the absence of an interested party. Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. The linchpin of the "impermissible collateral attack" doctrine—the attribution of preclusive effect to a failure to intervene—is inconsistent with Rules 19 and 24. Pp. 763–765.

(c) Neither *Penn-Central Merger and N & W Inclusion Cases*, 389 U. S. 486, nor *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U. S. 102, is authority for precluding respondents from challenging the actions taken under the consent decrees. Pp. 765–766.

(d) Even if there were some merit to the argument that the need to join affected parties would be burdensome and ultimately discouraging to civil rights litigation, acceptance of that argument would require a rewriting rather than an interpretation of the relevant Federal Rules. In any event, the difficulties in identifying those who would be adversely affected by a decree arise from the nature of the relief sought and not because of any choice between mandatory intervention and joinder. Plaintiffs who seek the aid of courts to alter employment policies, or the employer who might be subject to conflicting decrees, are best able to bear the burden of designating those who would be adversely affected if plaintiffs prevail. The alternative urged here does not eliminate the need for, or difficulty of, identifying persons who should be included in a lawsuit. It merely shifts that responsibility to less able shoulders. The system of joinder called for by the Federal Rules is not likely to produce more relitigation of issues than a converse rule, and best serves the interests involved in the run of litigated cases, including cases like the present ones. Pp. 766–768.

(e) With respect to the argument that the congressional policy favoring voluntary settlement of employment discrimination claims supports the "impermissible collateral attack" doctrine, it is essential to note what is meant by a "voluntary settlement." A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly "settle," voluntarily or otherwise, the conflicting claims of another group of employees who do not join in the agreement. Insofar as it may be easier to settle claims among a disparate group of affected persons if they are all before the court, joinder accomplishes that result as well as would a regime of mandatory intervention. P. 768.

833 F. 2d 1492, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 769.

James P. Alexander argued the cause for petitioners in Nos. 87–1639 and 87–1668. With him on the briefs for petitioners in No. 87–1668 were *Robert K. Spotswood, Richard H. Walston, Michael R. Pennington,* and *James K. Baker. Frank M. Young III* and *James C. Huckaby, Jr.*, filed a brief for petitioners in No. 87–1639. *Robert D. Joffe* argued the cause for petitioners in No. 87–1614. With him on the briefs were *Thomas D. Barr, Robert F. Mullen, Paul C. Saunders, Alden L. Atkins, William L. Robinson, Richard T. Seymour, Stephen L. Spitz,* and *Susan W. Reeves.*

Raymond P. Fitzpatrick, Jr., argued the cause for respondents Wilks et al. With him on the brief was *Courtney H. Mason, Jr. Deputy Solicitor General Merrill* argued the cause for the United States. On the brief were *Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Solicitor General Ayer, Deputy Assistant Attorney General Clegg, Michael R. Lazerwitz,* and *Dennis J. Dimsey.*†

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†Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *James M. Shannon*, Attorney General of Massachusetts, *Alice Daniel*, Deputy Attorney General, and *Jane S. Schacter* and *Peter Sacks*, Assistant Attorneys General, *Don Siegelman*, Attorney General of Alabama, *John Steven Clark*, Attorney General of Arkansas, *John Van de Kamp*, Attorney General of California, *Joseph I. Lieberman*, Attorney General of Connecticut, *Frederick D. Cooke*, Corporation Counsel of the District of Columbia, *Robert A. Butterworth*, Attorney General of Florida, *Michael J. Bowers*, Attorney General of Georgia, *Jim Jones*, Attorney General of Idaho, *Linley E. Pearson*, Attorney General of Indiana, *Thomas J. Miller*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *Frederic J. Cowan*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *J. Joseph Curran, Jr.*, Attorney Genral of Maryland, *Hubert H. Humphrey III*, Attorney

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

A group of white firefighters sued the city of Birmingham, Alabama (City), and the Jefferson County Personnel Board (Board) alleging that they were being denied promotions in favor of less qualified black firefighters. They claimed that the City and the Board were making promotion decisions on the basis of race in reliance on certain consent decrees, and that these decisions constituted impermissible racial discrimination in violation of the Constitution and federal statutes. The District Court held that the white firefighters were precluded from challenging employment decisions taken pursuant to the decrees, even though these firefighters had not been parties to the proceedings in which the decrees were

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General of Minnesota, *William L. Webster*, Attorney General of Missouri, *Mike Greely*, Attorney General of Montana, *Robert M. Spire*, Attorney General of Nebraska, *Brian McKay*, Attorney General of Nevada, *Stephen E. Merrill*, Attorney General of New Hampshire, *Cary Edwards*, Attorney General of New Jersey, *Robert Abrams*, Attorney General of New York, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Robert H. Henry*, Attorney General of Oklahoma, *James E. O'Neil*, Attorney General of Rhode Island, *T. Travis Medlock*, Attorney General of South Carolina, *Jim Mattox*, Attorney General of Texas, *Jeffrey Amestoy*, Attorney General of Vermont, *Mary Sue Terry*, Attorney General of Virginia, *Godfrey R. de Castro*, Attorney General of the Virgin Islands, *Charlie Brown*, Attorney General of West Virginia, *Donald J. Hanaway*, Attorney General of Wisconsin, and *Joseph B. Meyer*, Attorney General of Wyoming; for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *John A. Powell*, *Michael J. Wahoske*, *Mark B. Rotenberg*, and *Leslie J. Anderson;* for the Equal Employment Advisory Council by *Robert E. Williams* and *Douglas S. McDowell;* and for the National League of Cities et al. by *Benna Ruth Solomon*, *Beate Bloch*, and *Zachary D. Fasman*.

Briefs of *amici curiae* urging affirmance were filed for the International Association of Fire Fighters, AFL-CIO, by *Thomas A. Woodley* and *Michael S. Wolly;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Anthony T. Caso*.

N. Thompson Powers, *Ronald S. Cooper*, *Barry L. Goldstein*, *Julius LeVonne Chambers*, and *Ronald L. Ellis* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., et al. as *amici curiae*.

entered. We think this holding contravenes the general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party.

The litigation in which the consent decrees were entered began in 1974, when the Ensley Branch of the National Association for the Advancement of Colored People and seven black individuals filed separate class-action complaints against the City and the Board. They alleged that both had engaged in racially discriminatory hiring and promotion practices in various public service jobs in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, and other federal law. After a bench trial on some issues, but before judgment, the parties entered into two consent decrees, one between the black individuals and the City and the other between them and the Board. These proposed decrees set forth an extensive remedial scheme, including long-term and interim annual goals for the hiring of blacks as firefighters. The decrees also provided for goals for promotion of blacks within the fire department.

The District Court entered an order provisionally approving the decrees and directing publication of notice of the upcoming fairness hearings. App. 694–696. Notice of the hearings, with a reference to the general nature of the decrees, was published in two local newspapers. At that hearing, the Birmingham Firefighters Association (BFA) appeared and filed objections as *amicus curiae*. After the hearing, but before final approval of the decrees, the BFA and two of its members also moved to intervene on the ground that the decrees would adversely affect their rights. The District Court denied the motions as untimely and approved the decrees. *United States* v. *Jefferson County*, 28 FEP Cases 1834 (ND Ala. 1981). Seven white firefighters, all members of the BFA, then filed a complaint against the City and the Board seeking injunctive relief against enforcement of the decrees. The seven argued that the decrees would operate to illegally discriminate against them; the District Court denied relief. App. to Pet. for Cert. 37a.

Both the denial of intervention and the denial of injunctive relief were affirmed on appeal. *United States* v. *Jefferson County*, 720 F. 2d 1511 (CA11 1983). The District Court had not abused its discretion in refusing to let the BFA intervene, thought the Eleventh Circuit, in part because the firefighters could "institut[e] an independent Title VII suit, asserting specific violations of their rights." *Id.*, at 1518. And, for the same reason, petitioners had not adequately shown the potential for irreparable harm from the operation of the decrees necessary to obtain injunctive relief. *Id.*, at 1520.

A new group of white firefighters, the *Wilks* respondents, then brought suit against the City and the Board in District Court. They too alleged that, because of their race, they were being denied promotions in favor of less qualified blacks in violation of federal law. The Board and the City admitted to making race-conscious employment decisions, but argued that the decisions were unassailable because they were made pursuant to the consent decrees. A group of black individuals, the *Martin* petitioners, were allowed to intervene in their individual capacities to defend the decrees.

The defendants moved to dismiss the reverse discrimination cases as impermissible collateral attacks on the consent decrees. The District Court denied the motions, ruling that the decrees would provide a defense to claims of discrimination for employment decisions "mandated" by the decrees, leaving the principal issue for trial whether the challenged promotions were indeed required by the decrees. App. 237–239, 250. After trial the District Court granted the motion to dismiss. App. to Pet. for Cert. 67a. The court concluded that "if in fact the City was required to [make promotions of blacks] by the consent decree, then they would not be guilty of [illegal] racial discrimination" and that the defendants had "establish[ed] that the promotions of the black individuals . . . were in fact required by the terms of the consent decree." *Id.*, at 28a.

On appeal, the Eleventh Circuit reversed. It held that, "[b]ecause . . . [the *Wilks* respondents] were neither parties nor privies to the consent decrees, . . . their independent claims of unlawful discrimination are not precluded." *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F. 2d 1492, 1498 (1987). The court explicitly rejected the doctrine of "impermissible collateral attack" espoused by other Courts of Appeals to immunize parties to a consent decree from charges of discrimination by nonparties for actions taken pursuant to the decree. *Ibid.* Although it recognized a "strong public policy in favor of voluntary affirmative action plans," the panel acknowledged that this interest "must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed." *Ibid.* The court remanded the case for trial of the discrimination claims, suggesting that the operative law for judging the consent decrees was that governing voluntary affirmative-action plans. *Id.*, at 1497.[1]

We granted certiorari, 487 U. S. 1204 (1988), and now affirm the Eleventh Circuit's judgment. All agree that "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry* v. *Lee*, 311 U. S. 32, 40 (1940). See, *e. g.*,

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[1] Judge Anderson, dissenting, "agree[d] with the opinion for the court that these plaintiffs [the *Wilks* respondents] were not parties to the prior litigation which resulted in the consent decree, and that the instant plaintiffs are not bound by the consent decree and should be free on remand to challenge the consent decree prospectively and test its validity against the recent Supreme Court precedent." *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F. 2d, at 1503. He distinguished, however, between claims for prospective relief and claims for backpay, the latter being barred, in his opinion, by the City's good-faith reliance on the decrees. *Id.*, at 1502.

Parklane Hosiery Co. v. *Shore*, 439 U. S. 322, 327, n. 7 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University Foundation*, 402 U. S. 313, 328–329 (1971); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 110 (1969). This rule is part of our "deep-rooted historic tradition that everyone should have his own day in court." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4449, p. 417 (1981) (hereafter 18 Wright). A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.[2]

Petitioners argue that, because respondents failed to timely intervene in the initial proceedings, their current challenge to actions taken under the consent decree constitutes an impermissible "collateral attack." They argue that respondents were aware that the underlying suit might affect them, and if they chose to pass up an opportunity to intervene, they should not be permitted to later litigate the issues in a new action. The position has sufficient appeal to have commanded the approval of the great majority of the Federal Courts of Appeals,[3] but we agree with the contrary view expressed by the Court of Appeals for the Eleventh Circuit in these cases.

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[2] We have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party. See *Hansberry* v. *Lee*, 311 U. S. 32, 41–42 (1940) ("class" or "representative" suits); Fed. Rule Civ. Proc. 23 (same); *Montana* v. *United States*, 440 U. S. 147, 154–155 (1979) (control of litigation on behalf of one of the parties in the litigation). Additionally, where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process. See *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513, 529–530, n. 10 (1984) ("[P]roof of claim must be presented to the Bankruptcy Court . . . or be lost"); *Tulsa Professional Collection Services, Inc.* v. *Pope*, 485 U. S. 478, (1988) (nonclaim statute terminating unsubmitted claims against the estate). Neither of these exceptions, however, applies in these cases.

[3] For a sampling of cases from the Circuits applying the "impermissible collateral attack" rule or its functional equivalent, see, *e. g.*, *Striff* v.

We begin with the words of Justice Brandeis in *Chase National Bank* v. *Norwalk*, 291 U. S. 431 (1934):

> "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Id.* at 441.

While these words were written before the adoption of the Federal Rules of Civil Procedure, we think the Rules incorporate the same principle; a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined. See *Hazeltine*, *supra*, at 110 (judgment against Hazeltine vacated because it was not named as a party or served, even though as the parent corporation of one of the parties it clearly knew of the claim against it and had made a special appearance to contest jurisdiction). Against the background of permissive intervention set forth in *Chase National Bank*, the drafters cast Rule 24, governing intervention, in permissive terms. See Fed. Rule Civ. Proc. 24(a) (intervention as of right) ("Upon timely application anyone shall be permitted to intervene"); Fed. Rule

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Mason, 849 F. 2d 240, 245 (CA6 1988); *Marino* v. *Ortiz*, 806 F. 2d 1144, 1146–1147 (CA2 1986), aff'd by an equally divided Court, 484 U. S. 301 (1988); *Thaggard* v. *Jackson*, 687 F. 2d 66, 68–69 (CA5 1982), cert. denied *sub nom. Ashley* v. *City of Jackson*, 464 U. S. 900 (1983) (REHNQUIST, J., joined by BRENNAN, J., dissenting); *Stotts* v. *Memphis Fire Dept.*, 679 F. 2d 541, 558 (CA6 1982), rev'd on other grounds *sub nom. Firefighters* v. *Stotts*, 467 U. S. 561 (1984); *Dennison* v. *Los Angeles Dept. of Water & Power*, 658 F. 2d 694, 696 (CA9 1981); *Goins* v. *Bethlehem Steel Corp.*, 657 F. 2d 62, 64 (CA4 1981), cert. denied, 455 U. S. 940 (1982); *Society Hill Civic Assn.* v. *Harris*, 632 F. 2d 1045, 1052 (CA3 1980). Apart from the instant one, the only Circuit decision of which we are aware that would generally allow collateral attacks on consent decrees by nonparties is *Dunn* v. *Carey*, 808 F. 2d 555, 559–560 (CA7 1986).

Civ. Proc. 24(b) (permissive intervention) ("Upon timely application anyone may be permitted to intervene"). They determined that the concern for finality and completeness of judgments would be "better [served] by mandatory joinder procedures." 18 Wright §4452, p. 453. Accordingly, Rule 19(a) provides for mandatory joinder in circumstances where a judgment rendered in the absence of a person may "leave . . . persons already parties subject to a substantial risk of incurring . . . inconsistent obligations. . . ."[4] Rule 19(b) sets forth the factors to be considered by a court in deciding whether to allow an action to proceed in the absence of an interested party.[5]

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[4] Rule 19(a) provides:

"A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction . . . *shall* be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) *the person claims an interest relating to the subject of the action* and is so situated that the disposition of the action in the person's absence may (i) *as a practical matter impair or impede the person's ability to protect that interest* or (ii) *leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.* If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action." (Emphasis added.)

[5] Rule 19(b) provides:

"If a person . . . cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether

Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.[6] The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit. The linchpin of the "impermissible collateral attack" doctrine—the attribution of preclusive effect to a failure to intervene—is therefore quite inconsistent with Rule 19 and Rule 24.

Petitioners argue that our decisions in *Penn-Central Merger and N & W Inclusion Cases*, 389 U. S. 486 (1968), and *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U. S. 102 (1968), suggest an opposite result. The *Penn-Central* litigation took place in a special statutory framework enacted by Congress to allow reorganization of a huge railway system. Primary jurisdiction was in the Interstate Commerce Commission, with very restricted review in a statutory three-judge District Court. Review proceedings

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the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

[6] The dissent argues, on the one hand, that respondents have not been "bound" by the decree but, rather, that they are only suffering practical adverse effects from the consent decree. *Post*, at 770–772. On the other hand, the dissent characterizes respondents' suit not as an assertion of their own independent rights, but as a collateral attack on the consent decrees which, it is said, can only proceed on very limited grounds. *Post*, at 783–787. Respondents in their suit have alleged that they are being racially discriminated against by their employer in violation of Title VII: either the fact that the disputed employment decisions are being made pursuant to a consent decree is a defense to respondents' Title VII claims or it is not. If it is a defense to challenges to employment practices which would otherwise violate Title VII, it is very difficult to see why respondents are not being "bound" by the decree.

were channeled to the District Court for the Southern District of New York, and proceedings in other District Courts were stayed. The District Court upheld the decision of the Interstate Commerce Commission in both the merger and the inclusion proceedings, and the parties to that proceeding appealed to this Court. Certain Pennsylvania litigants had sued in the District Court for the Middle District of Pennsylvania to set aside the Commission's order, and this action was stayed pending the decision in the District Court for the Southern District of New York. We held that the borough of Moosic, one of the Pennsylvania litigants, could not challenge the Commission's approval of the merger and inclusion in the Pennsylvania District Court, pointing out the unusual nationwide character of the action and saying "[i]n these circumstances, it would be senseless to permit parties seeking to challenge the merger and the inclusion orders to bring numerous suits in many different district courts." 389 U. S., at 505, n. 4.

We do not think that this holding in *Penn Central*, based as it was upon the extraordinary nature of the proceedings challenging the merger of giant railroads and not even mentioning Rule 19 or Rule 24, affords a guide to the interpretation of the rules relating to joinder and intervention in ordinary civil actions in a district court.

Petitioners also rely on our decision in *Provident Bank*, *supra*, as authority for the view which they espouse. In that case we discussed Rule 19 shortly after parts of it had been substantially revised, but we expressly left open the question whether preclusive effect might be attributed to a failure to intervene. 390 U. S., at 114–115.

Petitioners contend that a different result should be reached because the need to join affected parties will be burdensome and ultimately discouraging to civil rights litigation. Potential adverse claimants may be numerous and difficult to identify; if they are not joined, the possibility for inconsistent judgments exists. Judicial resources will be needlessly consumed in relitigation of the same question.

Even if we were wholly persuaded by these arguments as a matter of policy, acceptance of them would require a rewriting rather than an interpretation of the relevant Rules. But we are not persuaded that their acceptance would lead to a more satisfactory method of handling cases like these. It must be remembered that the alternatives are a duty to intervene based on knowledge, on the one hand, and some form of joinder, as the Rules presently provide, on the other. No one can seriously contend that an employer might successfully defend against a Title VII claim by one group of employees on the ground that its actions were required by an earlier decree entered in a suit brought against it by another, if the later group did not have adequate notice or knowledge of the earlier suit.

The difficulties petitioners foresee in identifying those who could be adversely affected by a decree granting broad remedial relief are undoubtedly present, but they arise from the nature of the relief sought and not because of any choice between mandatory intervention and joinder. Rule 19's provisions for joining interested parties are designed to accommodate the sort of complexities that may arise from a decree affecting numerous people in various ways. We doubt that a mandatory intervention rule would be any less awkward. As mentioned, plaintiffs who seek the aid of the courts to alter existing employment policies, or the employer who might be subject to conflicting decrees, are best able to bear the burden of designating those who would be adversely affected if plaintiffs prevail; these parties will generally have a better understanding of the scope of likely relief than employees who are not named but might be affected. Petitioners' alternative does not eliminate the need for, or difficulty of, identifying persons who, because of their interests, should be included in a lawsuit. It merely shifts that responsibility to less able shoulders.

Nor do we think that the system of joinder called for by the Rules is likely to produce more relitigation of issues than the converse rule. The breadth of a lawsuit and concomitant relief may be at least partially shaped in advance through Rule 19 to avoid needless clashes with future litigation. And even under a regime of mandatory intervention, parties who did not have adequate knowledge of the suit would relitigate issues. Additional questions about the adequacy and timeliness of knowledge would inevitably crop up. We think that the system of joinder presently contemplated by the Rules best serves the many interests involved in the run of litigated cases, including cases like the present ones.

Petitioners also urge that the congressional policy favoring voluntary settlement of employment discrimination claims, referred to in cases such as *Carson* v. *American Brands, Inc.*, 450 U. S. 79 (1981), also supports the "impermissible collateral attack" doctrine. But once again it is essential to note just what is meant by "voluntary settlement." A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly "settle," voluntarily or otherwise, the conflicting claims of another group of employees who do not join in the agreement. This is true even if the second group of employees is a party to the litigation:

> "[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party . . . without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors." *Firefighters* v. *Cleveland*, 478 U. S. 501, 529 (1986).

Insofar as the argument is bottomed on the idea that it may be easier to settle claims among a disparate group of affected persons if they are all before the court, joinder bids fair to accomplish that result as well as a regime of mandatory intervention.

For the foregoing reasons we affirm the decision of the Court of Appeals for the Eleventh Circuit. That court remanded the case for trial of the reverse discrimination claims. *Birmingham Reverse Discrimination*, 833 F. 2d, at 1500–1502. Petitioners point to language in the District Court's findings of fact and conclusions of law which suggests that respondents will not prevail on the merits. We agree with the view of the Court of Appeals, however, that the proceedings in the District Court may have been affected by the mistaken view that respondents' claims on the merits were barred to the extent they were inconsistent with the consent decree.

Affirmed.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

As a matter of law there is a vast difference between persons who are actual parties to litigation and persons who merely have the kind of interest that may as a practical matter be impaired by the outcome of a case. Persons in the first category have a right to participate in a trial and to appeal from an adverse judgment; depending on whether they win or lose, their legal rights may be enhanced or impaired. Persons in the latter category have a right to intervene in the action in a timely fashion,[1] or they may be joined as parties against their will.[2] But if they remain on the sidelines, they

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[1] Federal Rule of Civil Procedure 24(a) provides in part:

"Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[2] Federal Rule of Civil Procedure 19(a) provides in part:

"A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of may be harmed as a practical matter even though their legal rights are unaffected.[3] One of the disadvantages of sideline-sitting is that the bystander has no right to appeal from a judgment no matter how harmful it may be.

In these cases the Court quite rightly concludes that the white firefighters who brought the second series of Title VII cases could not be deprived of their legal rights in the first series of cases because they had neither intervened nor been joined as parties. See *Firefighters* v. *Cleveland*, 478 U. S. 501, 529–530 (1986); *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 327, n. 7 (1979). The consent decrees obviously could not deprive them of any contractual rights, such as seniority, cf. *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757 (1983), or accrued vacation pay, cf. *Massachusetts* v. *Morash*, *ante*, p. 107, or of any other legal rights, such as the right to have their employer comply with federal statutes like Title VII, cf. *Firefighters* v. *Cleveland*, *supra*, at 529.[4] There is no reason, however, why the consent de-

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the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest . . . ."

[3] See *Provident Tradesmens Bank & Trust Co.* v. *Patterson* 390 U. S. 102, 110 (1968).

[4] As CHIEF JUSTICE REHNQUIST has observed:

"Suppose, for example, that the Government sues a private corporation for alleged violations of the antitrust laws and then enters a consent decree. Surely, the existence of that decree does not preclude a future suit by another corporation alleging that the defendant company's conduct, even if authorized by the decree, constitutes an antitrust violation. The nonparty has an independent right to bring his own private antitrust action for treble damages or for injunctive relief. See 2 P. Areeda & D. Turner, Antitrust Law ¶ 330, p. 143 (1978). Similarly, if an action alleging unconstitutional prison conditions results in a consent decree, a prisoner subsequently harmed by prison conditions is not precluded from bringing suit on the mere plea that the conditions are in accordance with the consent decree. Such compliance might be relevant to a defense of good-faith immunity, see Pet. for Cert. in *Bennett* v. *Williams*, O. T. 1982, No. 82–1704, but it would not suffice to block the suit altogether." *Ashley* v. *City of Jackson*, 464 U. S. 900, 902–903 (1983) (opinion dissenting from denial of certiorari).

In suggesting that compliance with a consent decree might be relevant to a defense of good-faith immunity, this passage recognizes that neither due crees might not produce changes in conditions at the white firefighters' place of employment that, as a practical matter, may have a serious effect on their opportunities for employment or promotion even though they are not bound by the decrees in any legal sense. The fact that one of the effects of a decree is to curtail the job opportunities of nonparties does not mean that the nonparties have been deprived of legal rights or that they have standing to appeal from that decree without becoming parties.

Persons who have no right to appeal from a final judgment—either because the time to appeal has elapsed or because they never became parties to the case—may nevertheless collaterally attack a judgment on certain narrow grounds. If the court had no jurisdiction over the subject matter, or if the judgment is the product of corruption, duress, fraud, collusion, or mistake, under limited circumstances it may be set aside in an appropriate collateral proceeding. See Restatement (Second) of Judgments §§69–72 (1982); *Griffith* v. *Bank of New York*, 147 F. 2d 899, 901 (CA2) (Clark, J.), cert. denied, 325 U. S. 874 (1945). This rule not only applies to parties to the original action, but also allows interested third parties collaterally to attack judgments.[5] In both civil and criminal cases, however, the

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process nor the Rules of Civil Procedure foreclose judicial recognition of a judgment that may have a practical effect on the interests of a nonparty.

[5] See F. James & G. Hazard, Civil Procedure §12.15, p. 681 (3d ed. 1985) (hereinafter James & Hazard). Since at least 1874, this Court has recognized that a third party may collaterally attack a judgment if the original judgment was obtained through fraud or collusion. In a case brought by an assignee in bankruptcy seeking to recover property allegedly transferred in fraud of the bankrupt's debtors, the Court wrote:

> "Judgments of any court, it is sometimes said, may be impeached by strangers to them for fraud or collusion, but the proposition as stated is subject to certain limitations, as it is only those strangers who, if the judgment is given full credit and effect, would be prejudiced in regard to some pre-existing right who are permitted to set up such a defense. Defenses of the kind may be set up by such strangers. Hence the rule that whenever a judgment or decree is procured through the fraud of either of the parties, or by the collusion of both, for the purpose of defrauding some third per-

grounds that may be invoked to support a collateral attack are much more limited than those that may be asserted as error on direct appeal.[6] Thus, a person who can foresee that a lawsuit is likely to have a practical impact on his interests may pay a heavy price if he elects to sit on the sidelines instead of intervening and taking the risk that his legal rights will be impaired.

In these cases there is no dispute about the fact that respondents are not parties to the consent decrees. It follows as a matter of course that they are not bound by those decrees.[7] Those judgments could not, and did not, deprive

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son, such third person may escape from the injury thus attempted by showing, even in a collateral proceeding, the fraud or collusion by which the judgment was obtained." *Michaels* v. *Post*, 21 Wall. 398, 426–427 (1874) (footnote omitted).

See also *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 184 (1920); 1 A. Freeman, Judgments § 318, p. 634 (5th ed. 1925). Similarly, strangers to a decree are sometimes allowed to challenge the decree by showing that the court was without jurisdiction. *Id.*, at p. 633. But cf. *Johnson* v. *Muelberger*, 340 U. S. 581 (1951) (noting that under Florida law, a child, seeking to protect her interest in her father's estate, may not collaterally attack her parents' divorce for want of jurisdiction). Of course, unlike parties to a decree, the question of subject-matter jurisdiction is not res judicata as to interested third parties. Cf. *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702, n. 9 (1982).

[6] We have long held that proceedings brought before a court collaterally "are by no means subject to all the exceptions which might be taken on a direct appeal." *Thompson* v. *Tolmie*, 2 Pet. 157, 162 (1829). See also *Teague* v. *Lane*, 489 U. S. 288, 303–310 (1989) (petition for writ of habeas corpus); *Liljeberg* v. *Health Services Aquisition Corp.*, 486 U. S. 847, 863–864 (1988) (Rule 60(b) motion); *United States* v. *Frady*, 456 U. S. 152, 165 (1982) (28 U. S. C. § 2255 motion); *Ackermann* v. *United States*, 340 U. S. 193, 197–202 (1950) (Rule 60(b) motion); *Sunal* v. *Large*, 332 U. S. 174, 177–179 (1947) (petition for writ of habeas corpus).

[7] As we held in *Firefighters* v. *Cleveland*, 478 U. S. 501, 529–530 (1986):

"Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori*, may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting [individuals] . . . .

them of any legal rights. The judgments did, however, have a practical impact on respondents' opportunities for advancement in their profession. For that reason, respondents had standing to challenge the validity of the decrees, but the grounds that they may advance in support of a collateral challenge are much more limited than would be allowed if they were parties prosecuting a direct appeal.[8]

The District Court's rulings in these cases have been described incorrectly by both the Court of Appeals and this Court. The Court of Appeals repeatedly stated that the Dis-

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And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree. See, *e. g., United States* v. *Ward Baking Co.*, 376 U. S. 327 (1964); *Hughes* v. *United States*, 342 U. S. 353 (1952); *Ashley* v. *City of Jackson*, 464 U. S., at 902 (REHNQUIST, J., dissenting from denial of certiorari); 1B Moore ¶ 0.409[5], p. 326, n. 2. However, the consent decree entered here does not bind Local 93 to do or not to do anything. It imposes no legal duties or obligations on the Union at all; only the parties to the decree can be held in contempt of court for failure to comply with its terms. See *United States* v. *Armour & Co.*, 402 U. S., at 676–677."

[8] The Eleventh Circuit, in a decision involving a previous attempt by white firefighters to set aside the consent decrees at issue in this litigation, itself observed: "There are . . . limitations on the extent to which a nonparty can undermine a prior judgment. A nonparty may not reopen the case and relitigate the merits anew; neither may he destroy the validity of the judgment between the parties." *United States* v. *Jefferson County*, 720 F. 2d 1511, 1518 (1983).

Professors James and Hazard describe the rule as follows:

"Ordinarily, a nonparty has no legal interest in a judgment in an action between others. Such a judgment does not determine the nonparty's rights and obligations under the rules of res judicata and he may so assert if the judgment is relied upon against him. But in some situations one's interests, particularly in one's own personal legal status or claims to property, may be placed in practical jeopardy by a judgment between others. In such circumstances one may seek the aid of a court of equity, but *the grounds upon which one may rely are severely limited.* The general rule is that one must show either that the judgment was void for lack of jurisdiction of the subject matter or that it was the product of fraud directed at the petitioner." James & Hazard § 12.15, p. 681 (emphasis supplied; footnotes omitted).

trict Court had "in effect" held that the white firefighters were "bound" by a decree to which they were not parties.[9] And this Court's opinion seems to assume that the District Court had interpreted its consent decrees in the earlier litigation as holding "that the white firefighters were precluded from challenging employment decisions taken pursuant to the decrees." *Ante*, at 758.[10] It is important, therefore, to make clear exactly what the District Court did hold and why its judgment should be affirmed.

I

The litigation in which the consent decrees were entered was a genuine adversary proceeding. In 1974 and 1975, two groups of private parties and the United States brought three separate Title VII actions against the city of Birmingham (City), the Personnel Board of Jefferson County (Board), and various officials,[11] alleging discrimination in hiring and promotion in several areas of employment, including the fire department. After a full trial in 1976, the District Court found that the defendants had violated Title VII and that a test used to screen job applicants was biased. App. 553. After a second trial in 1979 that focused on promotion practices—but before the District Court had rendered a decision—the parties negotiated two consent decrees, one with the City defendants and the other with the Board. App. to Pet. for Cert. 122a (City decree), 202a (Board decree). The United States is a party to both decrees. The District Court provisionally approved the proposed decrees and directed that the parties provide notice "to all interested persons informing them of the general provisions of the Consent Decrees . . . and of their right to file objections." App. 695. Approximately two months later, the District Court conducted a fairness hearing, at which a group of black employees objected to the decrees as inadequate and a group of white firefighters—represented in part by the Birmingham Firefighters Association (BFA)—opposed any race-conscious relief. *Id.*, at 727. The District Court overruled both sets of objections and entered the decrees in August 1981. 28 FEP Cases 1834 (ND Ala. 1981).

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[9] The Court of Appeals wrote:

—"Both the City and the Board, however, denied that they had violated Title VII or the equal protection clause. Both contended that the plaintiffs were bound by the consent decrees and that the promotions were therefore lawful as a matter of law because they had been made pursuant to those decrees." *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F. 2d 1492, 1496 (CA11 1987).

—"Without expressly so stating, the district judge treated the plaintiffs as if they were bound by the consent decrees and as if they were alleging solely that the City had violated the City decree." *Ibid.*

—"The court held that the plaintiffs—both the United States and the individual plaintiffs—were bound by the consent decrees." *Id.*, at 1497.

—"In effect, the court treated the plaintiffs as if they were parties to the City decree seeking an order to show cause why the City should not be held in civil contempt for violating the terms of the decree." *Id.*, at 1497, n. 16.

[10] See also, *ante*, at 762, where the Court suggests that the District Court held that its consent decrees had "conclude[d] the rights of strangers to those proceedings." (Footnote omitted.)

[11] These parties, along with six black firefighters who were party-plaintiffs to the 1974–1975 litigation, are petitioners herein.

In its decision approving the consent decrees, the District Court first noted "that there is no contention or suggestion that the settlements are fraudulent or collusive." *Id.*, at 1835. The court then explained why it was satisfied that the affirmative-action goals and quotas set forth in the decrees were "well within the limits upheld as permissible" in *Steelworkers* v. *Weber*, 443 U. S. 193 (1979), and other cases. 28 FEP Cases, at 1836. It pointed out that the decrees "do not preclude the hiring or promotion of whites and males even for a temporary period of time," *ibid.*, and that the City's commitment to promote blacks and whites to the position of fire lieutenant at the same rate was temporary and was subject both to the availability of qualified candidates and "to the caveat that the decree is not to be interpreted as requiring the hiring or promotion of a person who is not qualified or of a person who is demonstrably less qualified according to a job-related selection procedure," *id.*, at 1837. It further found that the record provided "more than ample reason" to conclude that the City would eventually be held liable for discrimination against blacks at high-level positions in the fire and police departments.[12] *Id.*, at 1838. Based on

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[12] In approving the decree, the District Court expressed confidence that the United States and the black firefighters brought suit in good faith and that there was a strong evidentiary basis for their complaints. It observed:

"The objectors treat this case as one in which discrimination on the basis of race or sex has not been established. That is only partially true, at least as it relates to positions in the police and fire departments. This court at the first trial found—and the Fifth Circuit agreed—that blacks applying for jobs as police officers and firefighters were discriminated against by the tests used by the Personnel Board to screen and rank applicants. The evidence presented at the second trial established, at the .01 level of statistical significance, that blacks were adversely affected by the exam used by the Personnel Board to screen and rank applicants for the position of police sergeant. Since governmental employers such as the City of Birmingham have been limited by state law to selecting candidates from among those certified by the Board, one would hardly be surprised to find that the process as a whole has had an adverse effect upon blacks seeking employment as Birmingham police officers, police sergeants, or firefighters—regardless of whether or not there was any actual bias on the part of selecting officials of the City. A natural consequence of discrimination against blacks at entry-level positions in the police and fire departments would be to limit their opportunities for promotion to higher levels in the departments.

"Employment statistics for Birmingham's police and fire departments as of July 21, 1981, certainly lend support to the claim made in this litigation against the City—that, notwithstanding this court's directions in 1977 with respect to certifications by the Personnel Board for the entry-level police officer and firefighters positions and despite the City's adoption of a 'fair hiring ordinance' and of affirmative action plans, the effects of past discrimination against blacks persist. According to those figures, 79 of the 480 police officers are black, 3 of the 131 police sergeants are black, and none of the 40 police lieutenants and captains are black. In the fire department, 42 of the 453 firefighters are black, and none of the 140 lieu-its understanding of the wrong committed, the court concluded that the remedy embodied in the consent decrees was "reasonably commensurate with the nature and extent of the indicated discrimination." *Ibid.* Cf. *Milliken* v. *Bradley*, 418 U. S. 717, 744 (1974). The District Court then rejected other specific objections, pointing out that the decrees would not impinge on any contractual rights of the unions or their members. 28 FEP Cases, at 1839. Finally, after noting that it had fully considered the white firefighters' objections to the settlement, it denied their motion to intervene as untimely. *Ibid.*

Several months after the entry of the consent decrees, the Board certified to the City that five black firefighters, as well as eight whites, were qualified to fill six vacancies in the position of lieutenant. See App. 81. A group of white firefighters then filed suit against the City and Board challenging their policy of "certifying candidates and making promotions on the basis of race under the assumed protection of consent settlements." App. to Pet. for Cert. 113a. The complaint alleged, in the alternative, that the consent decrees were illegal and void, or that the defendants were not properly implementing them. *Id.*, at 113a–114a. The plaintiffs filed motions for a temporary restraining order and a preliminary injunction. After an evidentiary hearing, the District Court found that the plaintiffs' collateral attack on the consent decrees was "without merit" and that four of the black officers were qualified for promotion in accordance with the terms of the decrees. App. 81–83. Accordingly, it denied the motions, *id.*, at 83, 85–86, and, for the first time in its history, the City had a black lieutenant in its fire department.

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tenants, captains, and battalion chiefs are black." 28 FEP Cases, at 1837–1838.

The evidence of discrimination presented at the 1979 trial is described in greater detail in the United States' 100-page, post-trial brief, which is reprinted in the Joint Appendix. See App. 594–693.

The plaintiffs' appeal from that order was consolidated with the appeal that had been previously taken from the order denying the motion to intervene filed in the earlier litigation. The Court of Appeals affirmed both orders. See *United States* v. *Jefferson County*, 720 F. 2d 1511 (CA11 1983). While that appeal was pending, in September 1983, the *Wilks* respondents filed a separate action against petitioners. The *Wilks* complaint alleged that petitioners were violating Title VII, but it did not contain any challenge to the validity of the consent decrees. App. 130. After various preliminary proceedings, the District Court consolidated these cases, along with four other reverse discrimination actions brought against petitioners, under the caption *In re: Birmingham Reverse Discrimination Litigation*. *Id.*, at 218. In addition, over the course of the litigation, the court allowed further parties to intervene.[13]

On February 18, 1985, the District Court ruled on the City's motion for partial summary judgment and issued an opinion that, among other things, explained its understanding of the relevance of the consent decrees to the issues raised in the reverse discrimination litigation. *Id.*, at 277. After summarizing the proceedings that led up to the entry of the consent decrees, the District Court expressly "recognized that the consent decrees might not bar all claims of 'reverse discrimination' since [the plaintiffs] had not been parties to the prior suits."[14] *Id.*, at 279. The court then took a position with respect to the relevance of the consent decrees that differed from that advocated by any of the parties. The plaintiffs contended that the consent decrees, even if valid, did not constitute a defense to their action, cf. *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757 (1983), and, in the alternative, that the decrees did not authorize the promotion of black applicants ahead of higher scoring white applicants and thus did not justify race-conscious promotions. App. 281–282. The City, on the other hand, contended that the promotions were immunized from challenge if they were either required or permitted by the terms of the decrees. *Id.*, at 282. The District Court took the intermediate position that promotions required by—and made because of—the decrees were justified.[15] However, it denied the City's summary judgment motion because it raised factual issues requiring a trial. *Id.*, at 288–289.

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[13] Among those allowed to intervene were seven black firefighters who were parties to the consent decrees and who sought to defend the decrees; the United States, which reversed course in the litigation and aligned itself with the plaintiffs; and additional white firefighters pressing individual reverse discrimination claims.

[14] During an earlier hearing, the District Court informed counsel:

"I do believe that the Court of Appeals said there is no per se prohibition against an attack, an indirect attack, in any event by a person whose rights may be affected during the implementation or claims implementation of the decree. To the extent the motions to dismiss or summary judgment take that position, I think the Court of Appeals said, no, that is not the law of this Circuit." *Id.*, at 237.

In December 1985, the court conducted a 5-day trial limited to issues concerning promotions in the City's fire and engineering departments.[16] At that trial, respondents challenged the validity of the consent decrees; to meet that challenge, petitioners introduced the records of the 1976 trial, the 1979 trial, and the fairness hearing conducted in 1981. Respondents also tried to prove that they were demonstrably better qualified than the black firefighters who had been promoted ahead of them. At the conclusion of the trial, the District Court entered a partial final judgment dismissing portions of the plaintiffs' complaints. The judge explained his ruling in an oral opinion dictated from the bench, supplemented by the adoption, with some changes, of detailed findings and conclusions drafted by the prevailing parties. See App. to Pet. for Cert. 27a, 37a.

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[15] The court indicated that if the race-conscious promotions were a product of the City's adherence to pending court orders (*i. e.*, the consent decrees), it could not be said that the City acted with the requisite racially discriminatory intent. See *id.*, at 280 ("[T]he court is persuaded that the defendants can . . . defend these reverse discrimination claims if they establish that the challenged promotions were made because of the requirements of the consent decree"). See also Tr. (May 14, 1984), reprinted in App. 237. In reaching this conclusion, the District Court was well aware of the Court of Appeals' previous suggestion that such a defense might be available:

"'The consent decree would only become an issue if the defendant attempted to justify its conduct by saying that it was mandated by the consent decree. If this were the defense, the trial judge would have to determine whether the defendant's action was mandated by the decree, and, if so, whether that fact alone would relieve the defendant of liability that would otherwise attach. This is, indeed, a difficult question. . . . We should not, however, preclude potentially wronged parties from raising such a question merely because it is perplexing.'" App. 280–281, n. 6, quoting *United States* v. *Jefferson County*, 720 F. 2d, at 1518–1519.

[16] At the close of the plaintiffs' case, the District Court granted the motion of the Board to dismiss the claims against it pursuant to Federal Rule

In his oral statement, the judge adhered to the legal position he had expressed in his February ruling. He stated:

> "The conclusions there expressed either explicitly or implicitly were that under appropriate circumstances, a valid consent decree appropriately limited can be the basis for a defense against a charge of discrimination, even in the situation in which it is clear that the defendant to the litigation did act in a racially conscious manner.
>
> "In that February order, it was my view as expressed then, that if the City of Birmingham made promotions of blacks to positions as fire lieutenant, fire captain and civil engineer, because the City believed it was required to do so by the consent decree, and if in fact the City was required to do so by the Consent Decree, then they would not be guilty of racial discrimination, either

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of Civil Procedure 41(b). The basis for the motion was the fact that, even without regard to the consent decrees, the plaintiffs had not proved a prima facie case against the Board, which had done nothing more than provide the City with the names of employees, both white and black, who were qualified for promotion. There was no evidence that the Board's certification process, or its testing procedures, adversely affected whites. I am at a loss to understand why the Court of Appeals did not affirm the judgment in favor of the Board.

> under Title 7, Section 1981, 1983 or the 14th Amendment. That remains my conclusion given the state of the law as I understand it." *Id.*, at 77a.

He then found as a matter of fact that petitioners had not promoted any black officers who were not qualified or who were demonstrably less qualified than the whites who were not promoted. He thus rejected respondents' contention that the City could not claim that it simply acted as required by terms of the consent decree:[17]

> "In this case, under the evidence as presented here, I find that even if the burden of proof be placed on the defendants, they have carried that proof and that burden of establishing that the promotions of the black individuals in this case were in fact required by the terms of the consent decree." *Id.*, at 78a.

The written conclusions of law that he adopted are less clear than his oral opinion. He began by unequivocally stating: "The City Decree is lawful."[18] *Id.*, at 106a. He explained that "under all the relevant case law of the Eleventh Circuit and the Supreme Court, it is a proper remedial device, designed to overcome the effects of prior, illegal discrimination by the City of Birmingham."[19] *Id.*, at 106a–

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[17] Paragraph 2 of the City decree provides, in pertinent part:

"Nothing herein shall be interpreted as requiring the City to . . . promote a person who is not qualified . . . or promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure." App. to Pet. for Cert. 124a.

[18] The District Court's opinion does not refer to the second consent decree because the claims against the Board had been dismissed at the end of the plaintiffs' case. See n. 16, *supra*.

[19] In support of this proposition, the court cited, *inter alia*, our decision in *Steelworkers* v. *Weber*, 443 U. S. 193 (1979). We recently reaffirmed the *Weber* decision in *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616 (1987). See also *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421 (1986) (plurality opinion); *id.*, at 483 (Powell, J., concurring in part and concurring in judgment); *id.*, at 489 (O'CONNOR, J., concurring in part and dissenting in part); *id.*, at 499 (WHITE, J., dissenting) (all re-

107a. In that same conclusion, however, he did state that "plaintiffs cannot collaterally attack the Decree's validity." *Id.*, at 106a. Yet, when read in context—and particularly in light of the court's finding that the decree was lawful under Eleventh Circuit and Supreme Court precedent—it is readily apparent that, at the extreme, this was intended as an alternative holding. More likely, it was an overstatement of the rule that collateral review is narrower in scope than appellate review. In any event, and regardless of one's reading of this lone sentence, it is absolutely clear that the court did not hold that respondents were bound by the decree. Nowhere in the District Court's lengthy findings of fact and conclusions of law is there a single word suggesting that respondents were bound by the consent decree or that the court intended to treat them as though they had been actual parties to that litigation and not merely as persons whose interests, as a practical matter, had been affected. Indeed, respondents, the Court of Appeals, and the majority opinion all fail to draw attention to any point in these cases' long history at which the judge may have given the impression that any nonparty was legally bound by the consent decree.[20]

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affirming that courts are vested with discretion to award race-conscious relief).

[20] In *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U. S., at 114, we expressly did not decide whether a litigant might "be bound by [a] previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene." See Note, Preclusion of Absent Disputants to Compel Intervention, 79 Colum. L. Rev. 1551 (1979) (arguing in favor of such a rule of mandatory intervention); 7 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1608, p. 115, n. 33 (2d ed. 1986) (drawing a parallel between the mandatory intervention rule and this Court's decision in *Penn-Central Merger and N & W Inclusion Cases*, 389 U. S. 486 (1968)). Today, the Court answers this question, at least in the limited context of the instant dispute, holding that "[j]oinder as a party [under Federal Rule of Civil Procedure 19], rather than knowledge of a lawsuit and an opportunity to intervene [under Federal Rule of Civil Procedure 24], is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or de-

II

Regardless of whether the white firefighters were parties to the decrees granting relief to their black co-workers, it would be quite wrong to assume that they could never collaterally attack such a decree. If a litigant has standing, he or she can always collaterally attack a judgment for certain narrowly defined defects. See, *e. g., Klapprott* v. *United States*, 335 U. S. 601 (1949); and cases cited in n. 5, *supra*. See also *Korematsu* v. *United States*, 584 F. Supp. 1406 (ND Cal. 1984) (granting writ of *coram nobis* vacating conviction based on Government concealment of critical contradictory evidence in *Korematsu* v. *United States*, 323 U. S. 214 (1944)). On the other hand, a district court is not required to retry a case—or to sit in review of another court's judgment—every time an interested nonparty asserts that *some* error that might have been raised on direct appeal was committed. See nn. 6 and 8, *supra*. Such a broad allowance of collateral review would destroy the integrity of litigated judgments, would lead to an abundance of vexatious litigation, and would subvert the interest in comity between courts.[21] Here, respondents have offered no circumstance

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cree." *Ante*, at 765. See also *ante*, at 763 ("[A] party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined"). Because I conclude that the District Court did not hold that respondents were bound by the consent decrees, I do not reach this issue.

[21] One leading commentator relies on the following poignant language employed by the Virginia Supreme Court to explain the significance of the doctrine limiting collateral attacks:

"'It is one . . . which has been adopted in the interest of the peace of society and the permanent security of titles. If, after the rendition of a judgment by a court of competent jurisdiction, and after the period has elapsed when it becomes irreversible for error, another court may in another suit inquire into the irregularities or errors in such judgment, there would be no end to litigation and no fixed established rights. A judgment, though unreversed and irreversible, would no longer be a final adjudication of the rights of the litigants, but the starting point from which a new litigation would spring up; acts of limitation would become useless and nugatory; purchasers on the faith of judicial process would find no protection; every that might justify reopening the District Court's settled judgment.

The implementation of a consent decree affecting the interests of a multitude of nonparties, and the reliance on that decree as a defense to a charge of discrimination in hiring and promotion decisions, raise a legitimate concern of collusion. No such allegation, however, has been raised. Moreover, there is compelling evidence that the decrees were not collusive. In its decision approving the consent decrees over the objection of the BFA and individual white firefighters, the District Court observed that there had been "no contention or suggestion" that the decrees were fraudulent or collusive. 28 FEP Cases, at 1835. The record of the fairness hearing was made part of the record of this litigation, and this finding was not contradicted. More significantly, the consent decrees were not negotiated until after the 1976 trial and the court's finding that the City had discriminated against black candidates for jobs as police officers and firefighters, see App. 553, and until after the 1979 trial, at which substantial evidence was presented suggesting that the City also discriminated against black candidates for promotion in the fire department, see n. 12, *supra*. Like the record of the 1981 fairness hearing, the records of both of these prior proceed-

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right established by a judgment would be insecure and uncertain; and a cloud would rest upon every title.'" 1 H. Black, Law of Judgments § 245, pp. 365–366 (2d ed. 1902), quoting *Lancaster* v. *Wilson*, 27 Gratt. 624, 629 (Va. 1876).

In addition to undermining this interest in finality, permitting collateral attacks also leads to the anomaly that courts will, on occasion, be required to sit in review of judgments entered by other courts of equal—or even greater—authority. Cf. *ASARCO Inc.* v. *Kadish*, *ante*, at 622–623; *District of Columbia Court of Appeals* v. *Feldman*, 460 U. S. 462 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 415–416 (1923). The rule is also supported by the fact that there is no assurance that a second round of litigation is more likely than the first to reach a just result or obtain uniformity in the law.

ings were made part of the record in these cases. Given this history, the lack of any indication of collusion, and the District Court's finding that "there is more than ample reason for . . . the City of Birmingham to be concerned that [it] would be in time held liable for discrimination against blacks at higher level positions in the police and fire departments," 28 FEP Cases, at 1838, it is evident that the decrees were a product of genuine arm's-length negotiations.

Nor can it be maintained that the consent judgment is subject to reopening and further litigation because the relief it afforded was so out of line with settled legal doctrine that it "was transparently invalid or had only a frivolous pretense to validity."[22] *Walker* v. *Birmingham*, 388 U. S. 307, 315 (1967) (suggesting that a contemner might be allowed to challenge contempt citation on ground that underlying court order was "transparently invalid"). To the contrary, the type of race-conscious relief ordered in the consent decrees is entirely consistent with this Court's approach to affirmative action. Given a sufficient predicate of racial discrimination, neither the Equal Protection Clause of the Fourteenth Amendment[23] nor Title VII of the Civil Rights Act of 1964[24] erects a bar to affirmative-action plans that benefit nonvictims and have some adverse effect on nonwrongdoers.[25] As JUSTICE O'CONNOR observed in *Wygant* v.

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[22] It was argued during the 1981 fairness hearing, in the first complaint filed in this litigation, see App. to Pet. for Cert. 113a, and in at least one of the subsequently filed complaints, see App. 96, that race-conscious relief for persons who are not proven victims of past discrimination is absolutely prohibited by the Equal Protection Clause of the Fourteenth Amendment and by Title VII of the Civil Rights Act of 1964. As I have pointed out, the *Wilks* complaint did not challenge the validity of the decrees. See App. 135–137.

[23] See *Wygant* v. *Jackson Bd. of Education*, 476 U. S. 267, 286 (1986) (O'CONNOR, J., concurring in part and concurring in judgment) ("The Court is in agreement that, whatever the formulation employed, remedying past discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program"). See also *Sheet Metal Workers*, 478 U. S., at 479–481 (plurality opinion); *id.*, at 484–489 (Powell, J., concurring in part and concurring in judgment).

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[24] In distinguishing the Court's decision in *Firefighters* v. *Stotts*, 467 U. S. 561 (1984), the plurality in *Sheet Metal Workers*, 478 U. S., at 474–475, asserted:

"However, this limitation on *individual* make-whole relief does not affect a court's authority to order race-conscious affirmative action. The purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future. Such relief is provided to the class as a whole rather than to individual members; no individual is entitled to relief, and beneficiaries need not show that they were themselves victims of discrimination. In this case, neither the membership goal nor the Fund order required petitioners to indenture or train particular individuals, and neither required them to admit to membership individuals who were refused admission for reasons unrelated to discrimination. We decline petitioners' invitation to read *Stotts* to prohibit a court from ordering any kind of race-conscious affirmative relief that might benefit nonvictims. This reading would distort the language of § 706(g), and would deprive the courts of an important means of enforcing Title VII's guarantee of equal employment opportunity."

See also *id.*, at 483 (Powell, J., concurring in part and concurring in judgment) ("plain language of Title VII does not clearly support a view that all remedies must be limited to benefiting victims," and "although the matter is not entirely free from doubt," the legislative history of Title VII indicates that nonvictims may be benefited); *id.*, at 490 (O'CONNOR, J., concurring in part and dissenting in part) ("It is now clear . . . that a majority of the Court believes that the last sentence of § 706(g) does not in all circumstances prohibit a court in a Title VII employment discrimination case from ordering relief that may confer some racial preferences with regard to employment in favor of nonvictims of discrimination"); *id.*, at 499 (WHITE, J., dissenting) ("I agree that § 706(g) does not bar relief for nonvictims in all circumstances").

[25] In my view, an affirmative-action plan need not be supported by a predicate of racial discrimination by the employer provided that the plan "serve[s] a valid public purpose, that it was adopted with fair procedures and given a narrow breadth, that it transcends the harm to [the nonminority employees], and that it is a step toward that ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race." *Wygant*, 476 U. S., at 320 (STEVENS, J., dissent-

Jackson Bd. of Education, 476 U. S. 267 (1986): "This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required." *Id.*, at 286 (opinion concurring in part and concurring in judgment). Such a belief was clearly justified in these cases. After conducting the 1976 trial and finding against the City and after listening to the five days of testimony in the 1979 trial, the judge was well qualified to conclude that there was a sound basis for believing that the City would likely have been found to have violated Title VII if the action had proceeded to a litigated judgment.[26]

Hence, there is no basis for collaterally attacking the judgment as collusive, fraudulent, or transparently invalid. Moreover, respondents do not claim—nor has there been any showing of—mistake, duress, or lack of jurisdiction. Instead, respondents are left to argue that somewhat different relief would have been more appropriate than the relief that was actually granted. Although this sort of issue may provide the basis for a direct appeal, it cannot, and should not, serve to open the door to relitigation of a settled judgment.

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ing). In these cases, however, the plan was undoubtedly preceded by an adequate predicate of racial discrimination; thus, I need not consider whether there is some present-day purpose that might justify a race-conscious promotion scheme.

[26] Moreover, the District Court, in its opinion approving the consent decrees, found that the remedies are "reasonably commensurate with the nature and extent of the indicated discrimination," are "limited in duration, expiring as particular positions generally reflect the racial . . . composition of the labor market in the county as a whole," allow for "substantial opportunity for employment advancement of whites and males," and "do not require the selection of blacks . . . who are unqualified or who are demonstrably less qualified than their competitors." 28 FEP Cases 1834, 1838 (ND Ala. 1981). Therefore, it cannot be claimed that the court failed to consider whether the remedies were tailored "to fit the nature of the violation." *Sheet Metal Workers*, 478 U. S., at 476. See also *id.*, at 496 (O'CONNOR, J., concurring in part and dissenting in part).

III

The facts that respondents are not bound by the decrees, and that they have no basis for a collateral attack, moreover, do not compel the conclusion that the District Court should have treated the decrees as nonexistent for purposes of respondents' discrimination suit. That the decrees may not directly interfere with any of respondents' legal rights does not mean that they may not affect the factual setting in a way that negates respondents' claim. The fact that a criminal suspect is not a party to the issuance of a search warrant does not imply that the presence of a facially valid warrant may not be taken as evidence that the police acted in good faith. See *Malley* v. *Briggs*, 475 U. S. 335, 344–345 (1986); *United States* v. *Leon*, 468 U. S. 897, 921–922, 924 (1984); *United States* v. *Ross*, 456 U. S. 798, 823, n. 32 (1982). Similarly, the fact that an employer is acting under court compulsion may be evidence that the employer is acting in good faith and without discriminatory intent. Cf. *Ashley* v. *City of Jackson*, 464 U. S. 900, 903 (1983) (REHNQUIST, J., dissenting from denial of certiorari) (suggesting that compliance with a consent decree "might be relevant to a defense of good-faith immunity"); Restatement (Second) of Judgments § 76, Comment *a*, p. 217 (1982) ("If the judgment is held to be not binding on the person against whom it is invoked, it is then ignored in the determination of matters in issue in the subsequent litigation, unless it is relevant for some other purpose such as proving the good faith of a party who relied on it"). Indeed, the threat of a contempt citation provides as good a reason to act as most, if not all, other business justifications.[27]

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[27] Because consent decrees "have attributes both of contracts and judicial decrees," they are treated differently for different purposes. *United States* v. *ITT Continental Baking Co.*, 420 U. S. 223, 236, n. 10 (1975). See also *Firefighters* v. *Cleveland*, 478 U. S., at 519. For example, because the content of a consent decree is generally a product of negotiations between the parties, decrees are construed for enforcement purposes as contracts. See *ITT Continental Baking Co.*, *supra*, at 238; *Stotts* v.

After reviewing the evidence, the District Court found that the City had in fact acted under compulsion of the consent decrees. App. to Pet. for Cert. 107a; *In re Birmingham Reverse Discrimination Employment Litigation*, 36 EPD ¶35022, p. 36,586 (ND Ala. 1985). Based on this finding, the court concluded that the City carried its burden of coming forward with a legitimate business reason for its promotion policy, and, accordingly, held that the promotion decisions were "not taken with the requisite discriminatory intent" necessary to make out a claim of disparate treatment under Title VII or the Equal Protection Clause. App. to Pet. for Cert. 107a, citing *United States* v. *Jefferson County*, 720 F. 2d, at 1518. For this reason, and not because it thought that respondents were legally bound by the consent decrees, the court entered an order in favor of the City and defendant-intervenors.

Of course, in some contexts a plaintiff might be able to demonstrate that reference to a consent decree is pretextual. See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981). For example, a plaintiff might be able to show that the consent decree was collusive and that the defendants simply obtained the court's rubber stamp on a private agreement that was in no way related to the eradication of pervasive racial discrimination. The plaintiff, alternatively, might be able to show that the defendants were not bound to obey the consent decree because the court that entered it was without jurisdiction. See *United States* v. *Mine*

Memphis Fire Dept., 679 F. 2d 541, 557 (CA6 1982), rev'd on other grounds, 467 U. S. 561 (1984). For purposes of determining whether an employer can be held liable for intentional discrimination merely for complying with the terms of a consent decree, however, it is appropriate to treat the consent decree as a judicial order. Unlike the typical contract, a consent decree, such as the ones at issue here, is developed in the context of adversary litigation. Moreover, the court reviews the consent decree to determine whether it is lawful, reasonable, and equitable. In placing the judicial *imprimatur* on the decree, the court provides the parties with some assurance that the decree is legal and that they may rely on it. Most significantly, violation of a consent decree is punishable as criminal contempt. See 18 U. S. C. §§401, 402; Fed. Rule Crim. Proc. 42.

Workers, 330 U. S. 258, 291–294 (1947). Similarly, although more tenuous, a plaintiff might argue that the parties to the consent judgment were not bound because the order was "transparently invalid" and thus unenforceable.[28] If the defendants were as a result not bound to implement the affirmative-action program, then the plaintiff might be able to show that the racial preference was not a product of the court order.

In a case such as these, however, in which there has been no showing that the decree was collusive, fraudulent, transparently invalid, or entered without jurisdiction, it would be "unconscionable" to conclude that obedience to an order remedying a Title VII violation could subject a defendant to additional liability. Cf. *Farmers* v. *WDAY, Inc.*, 360 U. S. 525, 531 (1959). Rather, all of the reasons that support the Court's view that a police officer should not generally be held liable when he carries out the commands in a facially valid warrant apply with added force to city officials, or indeed to private employers, who obey the commands contained in a decree entered by a federal court.[29] In fact, Equal Employment Opportunity Commission regulations concur in this assessment. They assert: "The Commission interprets Title VII to mean that actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII." 29 CFR § 1608.8 (1989).[30] Assuming that the District Court's findings of fact were not clearly erroneous—which of course is a matter that is not before us—it seems perfectly clear that its judgment should have been affirmed. Any other conclusion would subject large employers who seek to comply with the law by remedying past discrimination to a never-ending stream of litigation and potential liability. It is unfathomable that either Title VII or the Equal Protection Clause demands such a counterproductive result.

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[28] In *Walker* v. *Birmingham*, 388 U. S. 307 (1967), we held that a party can be held in contempt of court for violating an injunction, even if the injunction was invalid under the Federal Constitution. However, in upholding the contempt citations at issue, we made clear that that was "not a case where the injunction was transparently invalid or had only a frivolous pretense to validity." *Id.*, at 315. Courts and commentators have relied on this reservation in positing that a contempt citation may be collaterally attacked if the underlying order was "transparently invalid." See, *e. g.*, *In re Providence Journal Co.*, 820 F. 2d 1342 (CA1 1986), cert. dism'd *sub nom. United States* v. *Providence Journal*, 485 U. S. 693 (1988); 3 C. Wright, Federal Practice and Procedure § 702, p. 815, n. 17 (2d ed. 1982).

[29] Both warrants and consent decrees bear the indicium of reliability that a judicial officer has reviewed the proposed act and determined that it is lawful. See *United States* v. *Alexandria*, 614 F. 2d 1358, 1361 (CA5 1980) ("trial court must satisfy itself that the consent decree is not unlawful, unreasonable, or inequitable before it can be approved"); App. to Pet. for Cert. 238a. Unlike the police officer in receipt of a facially valid warrant, however, an employer with notice of an affirmative injunction has no choice

IV

The predecessor to this litigation was brought to change a pattern of hiring and promotion practices that had discriminated against black citizens in Birmingham for decades. The white respondents in these cases are not responsible for that history of discrimination, but they are nevertheless beneficiaries of the discriminatory practices that the litigation was designed to correct. Any remedy that seeks to create employment conditions that would have obtained if there had been no violations of law will necessarily have an adverse impact on whites, who must now share their job and promotion op-

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but to act. This added element of compulsion renders imposition of liability for acting pursuant to a valid consent decree all the more inequitable.

[30] Section 1608.8 does not differentiate between orders "entered by consent or after contested litigation." 29 CFR § 1608.8 (1989). Indeed, the reasoning in the Court's opinion today would seem equally applicable to litigated orders and consent decrees.

The Court's unwillingness to acknowledge that the grounds for a collateral attack on a judgment are significantly narrower than the grounds available on direct review, see *ante*, at 765, n. 6, is difficult to reconcile with the host of cases cited in *United States* v. *Frady*, 456 U. S., at 165, the cases cited in n. 6, *supra*, and those cited in the scholarly writings cited in n. 5, *supra*.

portunities with blacks.[31] Just as white employees in the past were innocent beneficiaries of illegal discriminatory practices, so is it inevitable that some of the same white employees will be innocent victims who must share some of the burdens resulting from the redress of the past wrongs.

There is nothing unusual about the fact that litigation between adverse parties may, as a practical matter, seriously impair the interests of third persons who elect to sit on the sidelines. Indeed, in complex litigation this Court has squarely held that a sideline-sitter may be bound as firmly as an actual party if he had adequate notice and a fair opportunity to intervene and if the judicial interest in finality is sufficiently strong. See *Penn-Central Merger and N & W Inclusion Cases*, 389 U. S. 486, 505–506 (1968). Cf. *Bergh* v. *Washington*, 535 F. 2d 505, 507 (CA9), cert. denied, 429 U. S. 921 (1976); *Safir* v. *Dole*, 231 U. S. App. D. C. 63, 70–71, 718 F. 2d 475, 482–83 (1983), cert. denied, 467 U. S. 1206 (1984); James & Hazard § 11.31, pp. 651–652.

There is no need, however, to go that far in order to agree with the District Court's eminently sensible view that compliance with the terms of a valid decree remedying violations of Title VII cannot itself violate that statute or the Equal Protection Clause.[32] The city of Birmingham, in entering into and complying with this decree, has made a substantial step toward the eradication of the long history of pervasive racial discrimination that has plagued its fire department. The District Court, after conducting a trial and carefully considering respondents' arguments, concluded that this effort is lawful and should go forward. Because respondents have thus already had their day in court and have failed to carry their burden, I would vacate the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

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[31] It is inevitable that nonminority employees or applicants will be less well off under an affirmative-action plan than without it, no matter what form it takes. For example, even when an employer simply agrees to recruit minority job applicants more actively, white applicants suffer the "nebulous" harm of facing increased competition and the diminished likelihood of eventually being hired. See Schwarzchild, Public Law By Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform, 1984 Duke L. J. 887, 909–910.

[32] In professing difficulty in understanding why respondents are not "bound" by a decree that provides a defense to employment practices that would otherwise violate Title VII, see *ante*, at 765, n. 6, the Court uses the word "bound" in a sense that is different from that used earlier in its opinion. A judgment against an employer requiring it to institute a seniority system may provide the employer with a defense to employment practices that would otherwise violate Title VII. In the sense in which the

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word "bound" is used in the cases cited by the Court, *ante*, at 761–762 of its opinion, only the parties to the litigation would be "bound" by the judgment. But employees who first worked for the company 180 days after the litigation ended would be "bound" by the judgment in the sense that the Court uses when it responds to my argument. The cases on which the Court relies are entirely consistent with my position. Its facile use of the word "bound" should not be allowed to conceal the obvious flaws in its analysis.

ALABAMA *v.* SMITH

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 88-333. Argued April 24, 1989—Decided June 12, 1989

An Alabama grand jury indicted respondent for burglary, rape, and sodomy, all related to a single assault. He agreed to plead guilty to the burglary and rape charges in exchange for the State's agreement to dismiss the sodomy charge. The trial judge granted the State's motion to dismiss the sodomy charge, accepted respondent's guilty plea, and sentenced him to concurrent terms of 30 years' imprisonment on each conviction. Later, respondent succeeded in having his guilty plea vacated and went to trial on the three original charges before the same trial judge. The jury found him guilty on all three counts. This time, the judge imposed a term of life imprisonment for the burglary conviction, plus a concurrent term of life imprisonment on the sodomy conviction and a consecutive term of 150 years' imprisonment on the rape conviction. The judge explained that he was imposing a harsher sentence than that imposed following the guilty plea because the evidence presented at trial, of which he had been unaware at the time sentence was imposed on the guilty plea, convinced him that the original sentence had been too lenient. The Alabama Court of Criminal Appeals affirmed the convictions and the life sentence for burglary and sodomy but remanded the rape conviction for resentencing. The Alabama Supreme Court granted respondent's request for review of the burglary sentence and reversed and remanded, holding that the increased sentence created a presumption of vindictiveness similar to that set forth in *North Carolina* v. *Pearce*, 395 U. S. 711.

Held: The *Pearce* presumption of vindictiveness does not apply when a sentence imposed after trial is greater than that previously imposed after a guilty plea. *Simpson* v. *Rice*, decided with *North Carolina* v. *Pearce*, *supra*, overruled. Pp. 798-803.

(a) Application of that presumption is limited to circumstances in which there is a "reasonable likelihood" that an unexplained increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the defendant has the burden of proving actual vindictiveness without aid of a presumption. Pp. 798-800.

(b) In cases like the present one, where the relevant sentencing information available to the judge after a guilty plea will usually be considerably less than that available after a trial, and where leniency that may have been shown in response to a guilty plea is no longer appropriate, there are enough justifications for a heavier second sentence that it cannot be said to be more likely than not that the judge who imposes such a sentence is motivated by vindictiveness. Pp. 800–803.

557 So. 2d 13, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, *post*, p. 803.

P. David Bjurberg, Assistant Attorney General of Alabama, argued the cause for petitioner. With him on the briefs were *Don Siegelman*, Attorney General, and *Rosa Hamlett Davis* and *J. Randall McNeill*, Assistant Attorneys General.

Paul J. Larkin, Jr., argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Acting Solicitor General Bryson, Assistant Attorney General Dennis*, and *Lawrence S. Robbins*.

Delores R. Boyd, by appointment of the Court, 489 U. S. 1063, argued the cause and filed a brief for respondent.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

James Lewis Smith pleaded guilty to charges of burglary and rape. In exchange for the plea, a sodomy charge was dropped. Later, Smith succeeded in having his guilty plea vacated. He went to trial on the three original charges, was convicted on each, and received a longer sentence on the burglary conviction than had been given after his guilty plea. The Alabama Supreme Court held that this increased sentence created a presumption of vindictiveness similar to that set forth in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). We hold that no presumption of vindictiveness arises when the first sentence was based upon a guilty plea, and the second sentence follows a trial.

In 1985, an Alabama grand jury indicted Smith for burglary, rape, and sodomy. All the charges related to a single assault. Smith agreed to plead guilty to the burglary and rape charges in exchange for the State's agreement to dismiss the sodomy charge. The trial court granted the State's motion to dismiss the sodomy charge, accepted respondent's guilty plea, and sentenced him to concurrent terms of 30-years' imprisonment on each conviction. Later, respondent moved to withdraw his guilty plea, claiming that he had not entered it knowingly and voluntarily. The trial court denied this motion, but the Alabama Court of Criminal Appeals reversed, finding that respondent had not been properly informed of the penalties associated with the crimes to which he had pleaded guilty. 494 So. 2d 182 (1986).

The case was reassigned to the same trial judge. The State moved to reinstate the charge of first-degree sodomy; the trial court granted that motion, and respondent went to trial on all three original charges. At trial, the victim testified that respondent had broken into her home in the middle of the night, clad only in his underwear and a ski mask and wielding a kitchen knife. Holding the knife to her chest, he had raped and sodomized her repeatedly and forced her to engage in oral sex with him. The attack, which lasted for more than an hour, occurred in the victim's own bedroom, just across the hall from the room in which her three young children lay sleeping. The State also offered respondent's postarrest statement, in which he admitted many of the details of the offenses. Respondent later took the stand and repudiated his postarrest statement, testifying instead that he had been in bed with his girl friend at the time the attack took place.

The jury returned a verdict of guilty on all three counts. This time, the trial judge imposed a term of life imprisonment for the burglary conviction, plus a concurrent term of life imprisonment on the sodomy conviction and a consecutive term of 150 years' imprisonment on the rape conviction. The trial court explained that it was imposing a harsher sentence than it had imposed following respondent's guilty plea because the evidence presented at trial, of which it had been unaware at the time it imposed sentence on the guilty plea, convinced it that the original sentence had been too lenient. See App. to Pet. for Cert. 28–30. As the court explained, at the time it imposed sentence on the guilty plea, it had heard only "[respondent's] side of the story"; whereas now, it "has had a trial and heard all of the evidence," including testimony that respondent had raped the victim at least five times, forced her to engage in oral sex with him, and threatened her life with a knife. *Ibid.* The court stated that this new information about the nature of respondent's crimes and their impact on the victim, together with its observations of his "mental outlook on [the offenses] and [his] position during the trial," convinced it that it was "proper to increase the sentence beyond that which was given to [him] on the plea bargain." *Id.*, at 30.

The Alabama Court of Criminal Appeals affirmed respondent's convictions, as well as the life sentences imposed for burglary and sodomy, but remanded the rape conviction for resentencing. The Supreme Court of Alabama then granted respondent's request for review of the burglary sentence, and reversed and remanded by a divided vote. *Ex parte Smith,* 557 So. 2d 13 (1988). The majority held that under our decision in *North Carolina* v. *Pearce*, *supra*, there can be no increase in sentence "upon reconviction at [a] second trial after the first conviction has been overturned on appeal and remanded for a new trial," unless the increase is justified by "'events subsequent to the first trial.'" 557 So. 2d, at 15. Because the majority thought the trial court had increased respondent's sentence for the burglary conviction based on new information about events occurring *prior* to the imposition of the original sentence—*e. g.*, new information about the nature of the crime and its effect on the victim—the majority held that *Pearce* required it to set aside that sentence.

The three dissenting justices argued that the *Pearce* presumption of vindictiveness did not apply where the original sentence is entered after a guilty plea. *Id.*, at 16. In their view, a defendant "should not be allowed to receive sentence concessions in return for a guilty plea and then, after a successful attack on that plea, bind the State to its original sentencing bargain if he is later convicted after a trial." *Id.*, at 17. Were it otherwise, they argued, a defendant "could go to trial and chance an acquittal knowing he could receive a sentence no harsher than he was originally given." *Ibid.*[1]

Because of the conflicting results reached by the lower courts on the question whether the *Pearce* presumption of vindictiveness applies when a sentence imposed after trial is greater than that previously imposed after a guilty plea,[2] we granted certiorari, 488 U. S. 1003 (1989), and now reverse.

While sentencing discretion permits consideration of a wide range of information relevant to the assessment of punishment, see *Williams* v. *New York*, 337 U. S. 241, 245–249 (1949), we have recognized it must not be exercised with the purpose of punishing a successful appeal. *Pearce*, 395 U. S., at 723–725. "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *Id.*, at 725. "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for him doing so must affirmatively appear." *Id.* at 726. Otherwise, a presumption arises that a greater sentence has been imposed for a vindictive purpose—a presumption that must be rebutted by "'objective information . . . justifying the increased sentence.'" *Texas* v. *McCullough*, 475 U. S. 134, 142 (1986) (quoting *United States* v. *Goodwin*, 457 U. S. 368, 374 (1982)).

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[1] The State filed an application for rehearing, which the Supreme Court of Alabama denied. App. to Pet. for Cert. 15. This time four justices dissented.

[2] Compare, for example, the Alabama Supreme Court's decision in the instant case, *Ex parte Smith*, 557 So. 2d 13 (1988), *State* v. *Sutton*, 197 Conn. 485, 498 A. 2d 65 (1985), and *United States* v. *Gilliss*, 645 F. 2d 1269 (CA8 1981), with *State* v. *Bawdon*, 386 N. W. 2d 484 (S. D. 1986), and *McKenzie* v. *Risley*, 842 F. 2d 1525, 1536–1537 (CA9 1988) (en banc).

While the *Pearce* opinion appeared on its face to announce a rule of sweeping dimension, our subsequent cases have made clear that its presumption of vindictiveness "do[es] not apply in every case where a convicted defendant receives a higher sentence on retrial." *Texas* v. *McCullough*, 475 U. S., at 138. As we explained in *Texas* v. *McCullough*, "the evil the *[Pearce]* Court sought to prevent" was not the imposition of "enlarged sentences after a new trial" but "vindictiveness of a sentencing judge." *Ibid.* See also *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 25 (1973) (the *Pearce* presumption was not designed to prevent the imposition of an increased sentence on retrial "for some valid reason associated with the need for flexibility and discretion in the sentencing process," but was "premised on the apparent need to guard against *vindictiveness* in the resentencing process"). Because the *Pearce* presumption "may operate in the absence of any proof of an improper motive and thus . . . block a legitimate response to criminal conduct," *United States* v. *Goodwin*, *supra*, at 373, we have limited its application, like that of "other 'judicially created means of effectuating the rights secured by the [Constitution],'" to circumstances "where its 'objectives are thought most efficaciously served,'" *Texas* v. *McCullough*, *supra*, at 138, quoting *Stone* v. *Powell*, 428 U. S. 465, 482, 487 (1976). Such circumstances are those in which there is a "reasonable likelihood," *United States* v. *Goodwin*, *supra*, at 373, that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness, see *Wasman* v. *United States*, 468 U. S. 559, 569 (1984).

In *Colten* v. *Kentucky*, 407 U. S. 104 (1972), for example, we refused to apply the presumption when the increased sentence was imposed by the second court in a two-tiered system which gave a defendant convicted of a misdemeanor in an inferior court the right to trial *de novo* in a superior court. We observed that the trial *de novo* represented a "completely fresh determination of guilt or innocence" by a court that was not being "asked to do over what it thought it had already done correctly." *Id.*, at 117. If the *de novo* trial resulted in a greater penalty, we said that "it no more follows that such a sentence is a vindictive penalty . . . than that the inferior court imposed a lenient penalty." *Ibid.* Consequently, we rejected the proposition that greater penalties on retrial were explained by vindictiveness "with sufficient frequency to warrant the imposition of a prophylactic rule." *Id.*, at 116. Similarly, in *Chaffin* v. *Stynchcombe*, 412 U. S. 17 (1973), we held that no presumption of vindictiveness arose when a second jury, on retrial following a successful appeal, imposed a higher sentence than a prior jury. We thought that a second jury was unlikely to have a "personal stake" in the prior conviction or to be "sensitive to the institutional interests that might occasion higher sentences."[3] *Id.*, at 26–28.

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[3] We adopted a similar prophylactic rule to guard against vindictiveness by the prosecutor at the postconviction stage in *Blackledge* v. *Perry*, 417 U. S. 21 (1974). There the prosecutor charged the defendant with a felony when the latter availed himself of *de novo* review of his initial conviction of a misdemeanor for the same conduct. He received a sentence of five to seven years for the felony compared to the 6-month sentence he had received for the misdemeanor. On these facts, we concluded that a presumption of vindictiveness arose analogous to that in *Pearce* because the "prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing." *Id.*, at 27. We made clear, however, that "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic

We think the same reasoning leads to the conclusion that when a greater penalty is imposed after trial than was imposed after a prior guilty plea, the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge. Even when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial. A guilty plea must be both "voluntary" and "intelligent," *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969), because it "is the defendant's admission in open court that he committed the acts charged in the indictment," *Brady* v. *United States*, 397 U. S. 742, 748 (1970). But the sort of information which satisfies this requirement will usually be far less than that brought out in a full trial on the merits.

As this case demonstrates, *supra*, at 796–797, in the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged. The defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation. *Supra*, at 797. See *United States* v. *Grayson*, 438 U. S. 41, 53 (1978) (sentencing authority's perception of the truthfulness of a defendant testifying on his own behalf may be considered in sentencing). Finally, after trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present. See *Brady* v. *United States*, *supra*, at 752. Here, too, although the same judge who sentenced following the guilty plea also imposes sentence following trial, in conducting the trial the court is not simply "do[ing] over what it thought it had already done correctly." *Colten*, *supra*, at

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likelihood of 'vindictiveness.'" *Ibid.* And in our other cases dealing with pretrial prosecutorial decisions to modify the charges against a defendant, we have continued to stress that "a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule." *United States* v. *Goodwin*, 457 U. S. 368, 384 (1982); *Bordenkircher* v. *Hayes*, 434 U. S. 357 (1978).

117. Each of these factors distinguishes the present case, and others like it, from cases like *Pearce*. There, the sentencing judge who presides at both trials can be expected to operate in the context of roughly the same sentencing considerations after the second trial as he does after the first; any unexplained change in the sentence is therefore subject to a presumption of vindictiveness. In cases like the present one, however, we think there are enough justifications for a heavier second sentence that it cannot be said to be more likely than not that a judge who imposes one is motivated by vindictiveness.

Our conclusion here is not consistent with *Simpson* v. *Rice*, the companion case to *North Carolina* v. *Pearce*. In *Simpson* v. *Rice*, the complained-of sentence followed trial after Rice had successfully attacked his previous guilty plea. 395 U. S., at 714. We found that a presumption of vindictiveness arose when the State offered "no evidence attempting to justify the increase in Rice's original sentences . . . ." *Id.*, at 726. With respect, it does not appear that the Court gave any consideration to a possible distinction between the *Pearce* case, in which differing sentences were imposed after two trials, and the *Rice* case, in which the first sentence was entered on a guilty plea.

The failure in *Simpson* v. *Rice* to note the distinction just described stems in part from that case's having been decided before some important developments in the constitutional law of guilty pleas. A guilty plea may justify leniency, *Brady* v. *United States*, *supra;* a prosecutor may offer a "recommendation of a lenient sentence or a reduction of charges" as part of the plea bargaining process, *Bordenkircher* v. *Hayes*, 434 U. S. 357, 363 (1978), and we have upheld the prosecutorial practice of threatening a defendant with increased charges if he does not plead guilty, and following through on that threat if the defendant insists on his right to stand trial, *ibid.;* we have recognized that the same mutual interests that support the practice of plea bargaining to avoid trial may also be pursued directly by providing for a more lenient sentence if the defendant pleads guilty, *Corbitt* v. *New Jersey*, 439 U. S. 212, 221–223 (1978).

Part of the reason for now reaching a conclusion different from that reached in *Simpson* v. *Rice*, therefore, is the later development of this constitutional law relating to guilty pleas. Part is the Court's failure in *Simpson* to note the greater amount of sentencing information that a trial generally affords as compared to a guilty plea. Believing, as we do, that there is no basis for a presumption of vindictiveness where a second sentence imposed after a trial is heavier than a first sentence imposed after a guilty plea, we overrule *Simpson* v. *Rice*, *supra*, to that extent. Respondent contends that there is evidence to support a finding of actual vindictiveness on the part of the sentencing judge in this case. This is not the question upon which we granted certiorari, and we decline to reach it here although it may be open to respondent on our remand to the Supreme Court of Alabama.

The judgment of the Supreme Court of Alabama is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, dissenting.

After successfully challenging the validity of his plea bargain on the ground that the trial judge had misinformed him about the penalties he could face, respondent Smith went to trial. He was convicted and resentenced to a drastically *longer* sentence than the one he had initially received as a result of his plea bargain. The majority today finds no infirmity in this result. I, however, continue to believe that, "if for *any* reason a new trial is granted and there is a conviction a second time, the second penalty imposed cannot exceed the first penalty, if respect is had for the guarantee against double jeopardy." *North Carolina* v. *Pearce*, 395 U. S. 711, 726–727 (1969) (Douglas, J., concurring, joined by MARSHALL, J.) (emphasis added). I therefore dissent.

SOUTH CAROLINA *v.* GATHERS

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 88–305. Argued March 28, 1989—Decided June 12, 1989

Respondent was convicted of murder and sentenced to death in a South Carolina court. The prosecutor's closing argument at the sentencing phase included his reading to the jury at length from a religious tract the victim was carrying and comments on the personal qualities that the prosecutor inferred from the victim's possession of the religious tract and a voter registration card. Finding that the prosecutor's "extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime," the South Carolina Supreme Court concluded that those comments "conveyed the suggestion [respondent] deserved a death sentence because the victim was a religious man and a registered voter," and, in reliance on *Booth* v. *Maryland,* 482 U. S. 496, reversed respondent's death sentence and remanded for a new sentencing proceeding.

Held: "For purposes of imposing the death penalty . . . [the defendant's] punishment must be tailored to his personal responsibility and moral guilt." *Enmund* v. *Florida,* 458 U. S. 782, 801. Here, the prosecutor's comments concerned the victim's personal characteristics, and "[a]llowing the jury to rely on [this information] . . . could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill." *Booth* v. *Maryland, supra,* at 505. The content of the religious tract and the voter registration card could not possibly have been relevant to the "circumstances of the crime." Where there was no evidence that respondent read either the tract or the voter card, the content of the papers the victim was carrying was purely fortuitous and could not provide any information relevant to respondent's moral culpability, notwithstanding that the papers had been admitted in evidence for other purposes. Pp. 810–812.

295 S. C. 476, 369 S. E. 2d 140, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. WHITE, J., filed a concurring opinion, *post,* p. 812. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY, J., joined, *post,* p. 812. SCALIA, J., filed a dissenting opinion, *post,* p. 823.

Donald J. Zelenka, Chief Deputy Attorney General of South Carolina, argued the cause for petitioner. With him on the briefs were *T. Travis Medlock*, Attorney General, and *Charles M. Condon*.

William Isaac Diggs argued the cause for respondent. With him on the brief was *Joseph L. Savitz III.**

JUSTICE BRENNAN delivered the opinion of the Court.

Respondent Demetrius Gathers was convicted of murder and sentenced to death for the killing of Richard Haynes. The evidence at trial showed that Gathers and three companions encountered Haynes, a stranger to them, at a park

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*Briefs of *amici curiae* urging reversal were filed for the Center for Civil Rights et al. by *Clint Bolick*, *Jerald L. Hill*, and *Mark Bredemeier;* and for the Washington Legal Foundation et al. by *Richard K. Willard*, *Daniel J. Popeo*, and *Paul D. Kamenar*.

Briefs of *amici curiae* urging affirmance were filed for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Julius LeVonne Chambers*, *George Kendall*, *Eric Schnapper*, and *Vivian Berger;* and for the South Carolina Public Defenders' Association et al. by *David I. Bruck* and *John H. Blume*.

Briefs of *amici curiae* were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Steve White*, Chief Assistant Attorney General, and *Michael D. Wellington* and *Frederick R. Millar, Jr.*, Supervising Deputy Attorneys General, *Don Siegelman*, Attorney General of Alabama, *John J. Kelly*, Chief State's Attorney of Connecticut, *Robert A. Butterworth*, Attorney General of Florida, *Michael J. Bowers*, Attorney General of Georgia, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Frederic J. Cowan*, Attorney General of Kentucky, *J. Joseph Curran*, Attorney General of Maryland, *William L. Webster*, Attorney General of Missouri, *Brian McKay*, Attorney General of Nevada, *W. Cary Edwards*, Attorney General of New Jersey, *Hal Stratton*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North Carolina, *Robert H. Henry*, Attorney General of Oklahoma, *Dave Frohnmayer*, Attorney General of Oregon, *Mary Sue Terry*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Joseph B. Meyer*, Attorney General of Wyoming; for the Mid-America Legal Foundation by *Joseph A. Morris;* for Barbara Babcock et al. by *Dean Hill Rivkin;* and for SOLACE et al. by *Paul L. Hoffman*, *Joan W. Howarth*, and *Michael Laurence*.

bench one evening. When Haynes rebuffed Gathers' attempt to initiate a conversation, Gathers and his friends assaulted Haynes, beating and kicking him severely and smashing a bottle over his head. Before leaving the scene, Gathers beat Haynes with an umbrella, which he then inserted into the victim's anus. Some time later Gathers apparently returned to the scene and stabbed Haynes with a knife.

Richard Haynes was about 31 years old and unemployed. For two years prior to his death he had been experiencing "some mental problems" and had been "in and out of [a] mental hospital" three times. App. 4. Although without formal religious training, Haynes considered himself a preacher and referred to himself as "Reverend Minister"; his mother testified that he would he would "tal[k] to people all the time about the Lord." *Id.*, at 5–6. He generally carried with him several bags containing articles of religious significance, including two Bibles, rosary beads, plastic statues, olive oil, and religious tracts. Among these items, on the evening of his murder, was a tract entitled "The Game Guy's Prayer." Relying on football and boxing metaphors, it extolled the virtues of the good sport. After Haynes was beaten, his assailants went through his belongings, looking (apparently in vain) for something worth stealing. In rummaging through his personal effects they scattered on the ground the contents of his wallet and bags, including the just-mentioned tract.

Gathers was tried in the Court of General Sessions for Charleston County, South Carolina. During the guilt phase the articles found at the scene of the crime were admitted into evidence without objection.* The jury found Gathers

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*The objects found scattered around Haynes' body were, for the most part, admitted into evidence during the testimony of Charleston police officer Anthony Hazel. Record 768–790. At no time then, or otherwise during the guilt phase, was there any reference to the *content* of the papers Haynes had with him. For example, the following was the entire colloquy at the time many of the papers were admitted:

guilty of murder and first-degree criminal sexual conduct. All of the testimony and exhibits from the guilt phase were readmitted into evidence at the sentencing phase. The State presented no other evidence at the sentencing phase, but the prosecutor's closing argument included the following remarks, which are the basis for the present controversy:

> "We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there. This defendant strewn *[sic]* them across the bike path, thinking nothing of that.
>
> "Among the many cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had this *[sic]* religious items, his beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers could care little about the fact that he is a religious person. Cared little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks.
>
> "But look at Reverend Minister Haynes' prayer. It's called the Game Guy's Prayer. 'Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask you for the stuff to give you one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me

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"Q. Okay . . . . What else?

"A. Point C, we found some personal papers.

"Q. Personal papers that appeared to belong to the victim?

"A. Yes, sir.

"Q. That would be State's Exhibit 19?

"A. Yes." *Id.*, at 782.

See also *id.*, at 787.

to understand that the game is full of knots and knocks and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me to always play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frameup or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life.'

"Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune. And he took things as they came along. He was prepared to deal with tragedies that he came across in his life.

. . . . .

"You will find some other exhibits in this case that tell you more about a just verdict. Again this is not easy. No one takes any pleasure from it, but the proof cries out from the grave in this case. Among the personal effects that this defendant could care little about when he went through it is something that we all treasure. Speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card.

> "Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers." *Id.*, at 41–43.

Finding that these "extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime," the Supreme Court of South Carolina concluded that the prosecutor's remarks "conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter." 295 S. C. 476, 484, 369 S. E. 2d 140, 144 (1988). Relying on our decision in *Booth* v. *Maryland*, 482 U. S. 496 (1987), the court reversed Gathers' sentence of death and remanded for a new sentencing proceeding. We granted certiorari, 488 U. S. 888 (1988), and we now affirm.

Our capital cases have consistently recognized that "[f]or purposes of imposing the death penalty . . . [the defendant's] punishment must be tailored to his personal responsibility and moral guilt." *Enmund* v. *Florida*, 458 U. S. 782, 801 (1982). See also *id.*, at 825 (O'CONNOR, J., dissenting) ("[P]roportionality requires a nexus between the punishment imposed and the defendant's blameworthiness"); *Tison* v. *Arizona*, 481 U. S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender"). Two Terms ago, in *Booth* v. *Maryland*, *supra*, we addressed the question whether use of "victim impact statements" in capital sentencing proceedings violated this principle that a sentence of death must be related to the moral culpability of the defendant. We held that such statements introduced factors that might be "wholly unrelated to the blameworthiness of a particular defendant." 482 U. S., at 504.

The statements placed before the jury in *Booth* included descriptions of the victims' personal characteristics, statements concerning the emotional impact of the crime on the victims' family, and the family members' opinions about the crime and the defendant. At issue in the present case is a statement of the first sort—one concerning personal characteristics of the victim. While in this case it was the prosecutor rather than the victim's survivors who characterized the victim's personal qualities, the statement is indistinguishable in any relevant respect from that in *Booth*. As in *Booth*, "[a]llowing the jury to rely on [this information] . . . could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill." *Id.*, at 505.

Our opinion in *Booth*, however, left open the possibility that the kind of information contained in victim impact statements could be admissible if it "relate[d] directly to the circumstances of the crime." *Id.*, at 507, n. 10. South Carolina asserts that such is the case here. Brief for Petitioner 25–41. It contends that the various personal effects which were "maliciously strewn around [the victim's] body during the event" were "relevant to the circumstances of the crime or reveal certain personal characteristics of the defendant." *Id.*, at 28.

We disagree. The fact that Gathers scattered Haynes' personal papers around his body while going through them looking for something to steal was certainly a relevant circumstance of the crime, and thus a proper subject for comment. But the prosecutor's argument in this case went well beyond that fact: he read to the jury at length from the religious tract the victim was carrying and commented on the personal qualities he inferred from Haynes' possession of the "Game Guy's Prayer" and the voter registration card. The *content* of these cards, however, cannot possibly have been relevant to the "circumstances of the crime." There is no evidence whatever that the defendant read anything that was printed on either the tract or the voter card. Indeed, it is extremely unlikely that he did so. The testimony at trial was that Gathers went through Haynes' bags very quickly, "just throwing [his belongings] everywhere, looking through things," App. 27, and that he spent not more than a minute doing so, *id.*, at 28. The crime took place, moreover, at night, along a dark path through a wooded area. *Id.*, at 17; Record 621–622, 926–927. Nor did the assailants have flashlights. *Id.*, at 622–623. Under these circumstances, the content of the various papers the victim happened to be carrying when he was attacked was purely fortuitous and cannot provide any information relevant to the defendant's moral culpability. Notwithstanding that the papers had been admitted into evidence for another purpose, their content cannot be said to relate directly to the circumstances of the crime.

The judgment of the Supreme Court of South Carolina is therefore

Affirmed.

JUSTICE WHITE, concurring.

Unless *Booth* v. *Maryland*, 482 U. S. 496 (1987), is to be overruled, the judgment below must be affirmed. Hence, I join JUSTICE BRENNAN's opinion for the Court.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, dissenting.

In *Booth* v. *Maryland*, 482 U. S. 496 (1987), this Court held that the Eighth Amendment prohibited a jury from considering a victim impact statement during the sentencing phase of a capital trial. The document at issue in *Booth* was compiled by the Maryland Division of Parole and Probation on the basis of extensive interviews with the two murder victims' son, daughter, son-in-law, and granddaughter. In addition to evidence relating to the personal qualities of the victims themselves, the statement in *Booth* described the emotional impact of the crime on the victims' family members, including their resulting sleeplessness, fear, depression, and constant painful memories. The statement also described the family members' opinions about the crime, the defendant, and the proper penalty to be imposed. *Id.*, at 509–515. The majority in *Booth* took the view that such information "may be wholly unrelated to the blameworthiness of a particular defendant," *id.*, at 504, and could divert the capital sentencer's attention from the circumstances of the crime and the defendant's background and record, *id.*, at 505. The majority noted that introduction of evidence of a victim's good character would entitle the defendant to rebut this evidence, resulting in "a 'mini-trial' on the victim's character." *Id.*, at 507. The Court also expressed concern that the opinions of family members regarding the crime and the defendant could serve to "inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Id.*, at 508.

Since our decision in *Booth*, there has been considerable confusion in the lower courts about the precise scope of its holding. Some courts, like the South Carolina Supreme Court in this case, have read *Booth* for the broad proposition that "the injection of the victim's personal characteristics into the sentencing determination" violates the Eighth Amendment. 295 S. C. 476, 484, 369 S. E. 2d 140, 144 (1988). Other courts have declined to read *Booth* so broadly, holding that it does not prohibit prosecutorial argument at the penalty phase concerning the personal characteristics of the victim. See, *e. g.*, *Daniels* v. *State*, 528 N. E. 2d 775, 782 (Ind. 1988); *Moon* v. *State*, 258 Ga. 748, 756, 375 S. E. 2d 442, 450 (Ga. 1988). See also *People* v. *Rich*, 45 Cal. 3d 1036, 1089–1090, 755 P. 2d 960, 993–994 (1988); *People* v. *Ghent*, 43 Cal. 3d 739, 771–772, 739 P. 2d 1250, 1271 (1987).

I joined both dissents in *Booth*, see *Booth*, 482 U. S., at 515 (WHITE, J., dissenting); *id.*, at 519 (SCALIA, J., dissenting), believing that the case was wrongly decided on its facts and rested on a misinterpretation of the Eighth Amendment and this Court's cases thereunder. Although I remain persuaded that *Booth* was wrong when decided and stand ready to overrule it if the Court would do so, we can reach a proper disposition in this case without such action. *Booth*'s central holding that statements about the harm to a victim's family have no place in capital sentencing does not control the case before us today. At issue here are solely prosecutorial comments about the victim himself. Thus, we must decide whether to adopt a broad reading of *Booth* as establishing a rigid Eighth Amendment rule eliminating virtually all consideration of the victim at the penalty phase, or a narrower reading of that decision which would allow jury consideration of information about the victim and the extent of the harm caused in arriving at its moral judgment concerning the appropriate punishment. See *Mills* v. *Maryland*, 486 U. S., 367, 398 (1988) (REHNQUIST, C. J., dissenting) ("I do not interpret *Booth* as foreclosing the introduction of all evidence, in whatever form, about a murder victim").

Because the Eighth Amendment itself requires "that the penalty imposed in a capital case be proportional to the harm caused and the defendant's blameworthiness," *Enmund* v. *Florida*, 458 U. S. 782, 823 (1982) (O'CONNOR, J., dissenting), I would reject a rigid Eighth Amendment rule which prohibits a sentencing jury from hearing argument or considering evidence concerning the personal characteristics of the victim. I would thus reverse the judgment of the South Carolina Supreme Court in this case. I also would decline respondent's invitation that this Court comb the record for indications that the prosecutor "misrepresented the evidence" in his closing argument or appealed to religious bias in violation of the Due Process Clause of the Fourteenth Amendment. See Brief for Respondent 21–24. Instead, I would remand the case to the South Carolina Supreme Court for that particular inquiry.

I

On a Saturday evening in September 1986, Richard Haynes sat peacefully on a park bench near his mother's home with a Bible and various religious items at his side. A vulnerable man with a history of mental problems, Haynes called himself "Reverend Minister" and shared his religious views with those who would listen. Haynes was approached by respondent Demetrius Gathers and three companions who sat down on the bench next to him and drank beer. After Haynes told Gathers he did not wish to converse with him, Gathers and two of his companions beat Haynes brutally, and Gathers smashed a bottle over his head. App. 18–22. As Haynes lay helpless, Gathers and one of his compatriots rummaged through the various religious and other items in Haynes' possession, strewing them around on the ground as they looked for something to steal. *Id.*, at 27–28, 34–35. Gathers' companions then left, but Gathers remained at the scene striking the unconscious Haynes with an umbrella and then forcing the umbrella into his anus. *Id.*, at 23–26. Gathers then departed and walked to a nearby apartment complex. *Id.*, at 26. Sometime later, Gathers and one other companion returned to the park with a knife. Gathers admitted that he then stabbed Haynes to death. *Id.*, at 30, 36.

At Gathers' trial for murder and criminal sexual conduct, Richard Haynes' mother testified without objection about her son's mental problems and his practice of carrying a Bible and other religious items and "talk[ing] to people all the time about the Lord." *Id.*, at 5. One of Gathers' companions testified that Haynes' Bible was clearly visible on the park bench as they approached him on the night of the murder. *Id.*, at 26–27. All the items Haynes carried with him that night—including olive oil, plastic angels, rosary beads, two Bibles, a voter registration card, and the "Game Guy's Prayer"—were introduced into evidence without objection during the guilt phase of the trial. *Id.*, at 8–10; Record 565–567, 782–783, 785–787. Those items were reintroduced into evidence without objection at the penalty phase. *Id.*, at 1167.

The jury convicted respondent of murder and first degree criminal sexual conduct. During his closing argument at the penalty phase, the prosecutor referred to the fact that Richard Haynes was a religious person as well as a vulnerable man with mental problems who was unable to keep a regular job. The prosecutor referred to several of the religious items that had been introduced into evidence. He also read the "Game Guy's Prayer" in its entirety, suggesting that Haynes was the sort of person who "took things as they came along" and "was prepared to deal with tragedies that he came across in his life." App. 43. The prosecutor also referred to Haynes' voter registration card found beside his body, arguing that the card "[s]peaks a lot about Reverend Minister Haynes" who "believed in this community" and believed "that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers." *Ibid.*

The sentencing jury was then given instructions which are not challenged here and returned a recommendation that the death sentence be imposed. The South Carolina Supreme Court reversed Gathers' death sentence, finding that the prosecutor's closing argument at the sentencing proceeding violated the Eighth Amendment "by focusing extensively on the personal characteristics of the victim." 295 S. C., at 482, 369 S. E. 2d, at 143.

II

Booth should not be read, in my view, to preclude prosecutorial comment which gives the sentencer a "glimpse of the life" a defendant "chose to extinguish." *Mills* v. *Maryland*, *supra*, at 397 (REHNQUIST, C. J., dissenting). "The fact that there is a victim, and facts about the victim properly developed during the course of the trial, are not so far outside the realm of 'circumstances of the crime' that mere mention will always be problematic." *Brooks* v. *Kemp*, 762 F. 2d 1383, 1409 (CA11 1985) (en banc), vacated on other grounds, 478 U. S. 1016 (1986), judgment reinstated, 809 F. 2d 700

(CA11) (en banc), cert. denied, 483 U. S. 1010 (1987). In my view, nothing in the Eighth Amendment precludes the prosecutor from conveying to the jury a sense of the unique human being whose life the defendant has taken.

More fundamentally, this case illustrates the one-sided nature of the moral judgment that the Court's broad reading of *Booth* would require of the capital sentencer. This Court has consistently required that a jury at the penalty phase be allowed to consider a wide range of information concerning the background of the defendant. Thus, not merely the circumstances of the crime are relevant, but as we stated in *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978): "[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death" (emphasis in original; footnote omitted). See also *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). Our decisions in *Lockett* and *Eddings* were based on the proposition that the decision of the capital sentencer is a profoundly moral one and must reflect the moral judgment of the community regarding the proper penalty to be inflicted on a particular individual for his or her actions. Evidence extraneous to the crime itself is deemed relevant and indeed, constitutionally so, "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring). In this case, the sentencing jury heard testimony from respondent's mother, his sister, and his cousin, all indicating that he was an affectionate and caring person. Record 1183, 1187, 1199. Gathers' sixth grade teacher testified that he was a quiet and affectionate child but that he was not given sufficient guidance and discipline at home. *Id.*, at 1193, 1195. None of this evidence was directly relevant to the events of September 13, 1986, but all of it was relevant to the jury's assessment of respondent himself and his moral blameworthiness.

Similarly, one of the factors that has long entered into society's conception of proper punishment is the harm caused by the defendant's actions. Thus, we have long recognized that retribution itself is a valid penological goal of the death penalty. See *Gregg* v. *Georgia*, 428 U. S. 153, 183 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). Indeed, we have expressly noted that while "retribution is an element of all punishments society imposes," it "clearly plays a more prominent role in a capital case." *Spaziano* v. *Florida*, 468 U. S. 447, 462 (1984). "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison* v. *Arizona*, 481 U. S. 137, 149 (1987). Moreover, one essential factor in determining the defendant's culpability is the extent of the harm caused.

That the harm caused by a defendant's actions is relevant to the capital sentencer's moral judgment concerning the appropriate penalty, even if the defendant did not specifically intend that harm, is a principle recognized both in the decisions of this Court and in legislative decisions concerning appropriate levels of punishment. In *Tison* v. *Arizona*, *supra*, we held that the Eighth Amendment did not preclude imposing the death penalty on two brothers who participated substantially in their father's armed prison breakout and in a related kidnaping and robbery that resulted in four murders, even though neither defendant "took any act which he desired to, or was substantially certain would, cause death." *Id.*, at 150. We found that the Tisons' involvement in the crime was such that "both subjectively appreciated that their acts were likely to result in the taking of innocent life," *id.*, at 152, and that "the record would support a finding of the culpable mental state of reckless indifference to human life," *id.*, at 151. We noted that "reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill,'" *id.*, at 157, and we remanded the case to the Supreme Court of Arizona for a specific determination whether the Tisons possessed that mental state, *id.*, at 158. What was critical to the defendants' eligibility for the death penalty in *Tison* was the harm they helped bring about: the death of four innocent human beings. In a similar manner, society punishes reckless driving differently from vehicular homicide; the distinction rests not on any difference in the defendant's mental state but on the notion that one of the legitimate concerns of any sentencer is the harm that the defendant's actions have caused. See *Booth*, 482 U. S., at 516 (WHITE, J., dissenting) ("There is nothing aberrant in a juror's inclination to hold a murderer accountable not only for his internal disposition in committing the crime but also for the full extent of the harm he caused"). In the death penalty context, no State authorizes infliction of the penalty for attempted murder, yet the criminal defendant who has attempted to kill another human being has the same mental state as the actual killer. Indeed, as JUSTICE SCALIA noted in dissent in *Booth*, the difference between murder and attempted murder may often hinge on a fortuity over which the defendant has no control at all. See *id.*, at 519. The only distinction is the harm to the community which results from the defendant's actions, and this distinction is deemed sufficient to support a difference in punishment between a sentence of years and the ultimate penalty.

Nothing in the Eighth Amendment precludes a State, if it chooses, from "includ[ing] as a sentencing consideration the particularized harm that an individual's murder causes to the rest of society," *id.*, at 517 (WHITE, J., dissenting). Indeed, precisely because the harm caused to society by a particular victim's death is relevant to society's moral judgment concerning the proper punishment, I would decline to read *Booth* for the broad proposition that the victim's personal characteristics are irrelevant at the sentencing phase of a capital trial. A rigid Eighth Amendment rule which excludes all such considerations is not supported by history or societal consensus, and it withholds information which a State may clearly deem relevant to the reasoned moral judgment of a capital sentencer.

Thus, I would reverse the judgment of the South Carolina Supreme Court on this issue. In his closing argument in this case, the prosecutor focused on the heinous nature of respondent's crime. App. 40–41. The prosecutor brought the jury's attention to the fact that Richard Haynes was a religious person whose religious belongings were callously ransacked by Gathers during the attack. *Id.*, at 41. The prosecutor commented on some of the specific items introduced into evidence, and he read the "Game Guy's Prayer," which was found at the scene of the murder. That "Prayer," which invokes sports metaphors and stresses the virtues of being an accepting and resilient "good sport" in the game of life, was used by the prosecutor to stress the vulnerability and simple humanity of the victim. As the prosecutor argued: "Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune." *Id.*, at 42. The prosecutor also commented on the victim's possession of a voter registration card at the time of his death, indicating that it "[s]peaks a lot about Reverend Minister Haynes," and exemplified the victim's "belie[f] in this community." In sum, the prosecutor stressed that the victim was an ordinary citizen who trusted that he could sit quietly on a public park bench without the risk of death.

In my view, no aspect of the prosecutor's argument in this case violated the Eighth Amendment. The jury found at the guilt phase that Gathers made a conscious decision to kill another human being. Just as Gathers' own background was important to the jury's assessment of him as a "uniquely individual human bein[g]," see *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976), so information about his equally unique victim was relevant to the jury's assessment of the harm he had caused and the appropriate penalty. Nothing in the Eighth Amendment precludes the community from considering its loss in assessing punishment nor requires that the victim remain a faceless stranger at the penalty phase of a capital trial. That the victim in this case was a deeply religious and harmless individual who exhibited his care for his community by religious proselytization and political participation in its affairs was relevant to the community's loss at his demise, just as society would view with grief and anger the killing of the mother or father of small children. See *Booth, supra,* at 516 (WHITE, J., dissenting). The Eighth Amendment stands as a shield against those practices and punishments which are either inherently cruel or which so offend the moral consensus of this society as to be deemed "cruel and unusual." *Trop* v. *Dulles,* 356 U. S. 86, 101 (1958). Because neither aspect of the Eighth Amendment was offended by the prosecutor's remarks, I would reverse the judgment below.

III

As an alternative ground supporting the judgment below, Gathers argues that the prosecutor engaged in "manipulation of the evidence and outright fabrication" in his portrait of the victim's personal characteristics based on inferences from the "Game Guy's Prayer" and the voter registration card. Brief for Respondent 22. Gathers also contends that the prosecutor's closing argument impermissibly invited the jury to impose the death sentence on the basis of the victim's religion and political affiliation in violation of the Due Process Clause. *Id.,* at 23. It would indeed be improper for a prosecutor to urge that the death penalty be imposed *because* of the race, religion, or political affiliation of the victim. As JUSTICE WHITE wrote in dissent in *Booth,* "It is no doubt true that the State may not encourage the sentencer to rely on a factor such as the victim's race in determining whether the death penalty is appropriate. Cf. *McCleskey* v. *Kemp,* 481 U. S.

279 (1987)." *Booth*, 482 U. S., at 517. See also *Zant* v. *Stephens*, 462 U. S. 862, 885 (1983) (if a State "attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant . . . due process of law would require that the jury's decision to impose death be set aside"); *Furman* v. *Georgia*, 408 U. S. 238, 242 (1972) (Douglas, J., concurring); *Brooks* v. *Kemp*, 762 F. 2d, at 1409.

Evaluation of Gathers' claim requires consideration of the entire record to determine whether any allegedly erroneous or improper remarks so infected the entire proceedings with unfairness as to render the resulting sentence a denial of due process. See *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 643 (1974); *Darden* v. *Wainwright*, 477 U. S. 168 (1986). Because the "Game Guy's Prayer" was already in evidence without objection and could have been read by the jury even if the prosecutor never mentioned it, the prosecutor's reading of that document during his closing argument may constitute harmless error. Nevertheless, I would remand this case to the South Carolina Supreme Court to conduct this inquiry in the first instance.

Gathers also argues that he did not have the opportunity to rebut the prosecutor's positive statements about the victim's characteristics, and thus that his death sentence violates the dictates of *Gardner* v. *Florida*, 430 U. S. 349, 362 (1977) (opinion of STEVENS, J.) (due process precludes imposition of the death penalty on the basis of information in a presentence report which the defendant had no opportunity to rebut). Brief for Respondent 18–20. "No doubt a capital defendant must be allowed to introduce relevant evidence in rebuttal to a victim impact statement." *Booth*, 482 U. S., at 518 (WHITE, J., dissenting); *id.*, at 506–507 (opinion of the Court). In this case, however, respondent has pointed to no evidence introduced at the penalty phase that he was precluded from rebutting. Rather, the prosecutor commented upon evidence introduced without objection at the guilt phase of the trial and drew various inferences from that evidence. Just as the prosecutor could comment upon evidence in the record about the victim during his closing argument, so could defense counsel. In fact, defense counsel did comment upon the prosecutor's repeated reference to Haynes as "Reverend Minister." App. 45. But, like respondent's other due process claim, this issue is best addressed by the South Carolina Supreme Court on remand. Because the majority instead adopts an Eighth Amendment barrier to virtually any discussion of the victim's personal characteristics at the penalty phase of a murder trial, I respectfully dissent.

JUSTICE SCALIA, dissenting.

Two Terms ago, when we decided *Booth* v. *Maryland*, 482 U. S. 496 (1987), I was among four Members of the Court who believed that the decision imposed a restriction upon state and federal criminal procedures that has no basis in the Constitution. See *id.*, at 515 (WHITE, J., dissenting); *id.*, at 519 (SCALIA, J., dissenting). I continue to believe that *Booth* was wrongly decided, and my conviction that it does perceptible harm has been strengthened by subsequent writings pointing out the indefensible consequences of a rule that the specific harm visited upon society by a murderer may not be taken into account when the jury decides whether to impose the sentence of death. See *ante*, at 816–820 (O'CONNOR, J., dissenting); *Mills* v. *Maryland*, 486 U. S. 367, 397 (1988) (REHNQUIST, C. J., dissenting). Once it is accepted, moreover, that the nature of the specific harm may be considered, I see no basis for drawing a distinction for Eighth Amendment purposes between the admirable personal characteristics of the particular victim and the particular injury caused to the victim's family and fellow citizens. Indeed, I would often find it impossible to tell which was which. (Would the fact that the victim was a dutiful husband and father be a personal characteristic or an indication of injury to others?) I therefore think the present case squarely calls into question the validity of *Booth*, and I would overrule that case.

It has been argued that we should not overrule so recent a decision, lest our action "appear to be . . . occasioned by nothing more than a change in the Court's personnel," and the rules we announce no more than "'the opinions of a small group of men who temporarily occupy high office.'" Brief for Barbara Babcock et al. as *Amici Curiae* 29–30 (quoting *Florida Dept. of Health and Rehabilitative Services* v. *Florida Nursing Home Assn.*, 450 U. S. 147, 154 (1981) (STEVENS, J., concurring)). I doubt that overruling *Booth* will so shake the citizenry's faith in the Court. Overrulings of precedent rarely occur without a change in the Court's personnel. The only distinctive feature here is that the overruling would follow not long after the original decision. But that is hardly unprecedented. See, *e. g.*, *Daniels* v. *Williams*, 474 U. S. 327, 330–331 (1986) (overruling *Parratt* v. *Taylor*, 451 U. S. 527 (1981)); *United States* v. *Scott*, 437 U. S. 82, 86–87 (1978) (overruling *United States* v. *Jenkins*, 420 U. S. 358 (1975)); *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943) (overruling *Minersville School District Board of Education* v. *Gobitis*, 310 U. S. 586 (1940)). Indeed, I had thought that the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity. The freshness of error not only deprives it of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it. That is particularly true with respect to a decision such as *Booth*, which is in that line of cases purporting to reflect "evolving standards of decency" applicable to capital punishment. *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion). Once a law-abiding society has revised its laws and practices to comply with such an erroneous decision, the existence of a new "consensus" can be appealed to—or at least the existence of the pre-existing consensus to the contrary will no longer be evident—thus enabling the error to triumph by our very failure promptly to correct it. Cf. *Thompson* v. *Oklahoma*, 487 U. S. 815, 854–855 (1988) (O'CONNOR, J., concurring in judgment).

In any case, I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face. With some reservation concerning decisions that have become so embedded in our system of government that return is no longer possible (a description that surely does not apply to *Booth*), I agree with Justice Douglas: "A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736 (1949). Or as the Court itself has said: "[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." *Smith* v. *Allwright*, 321 U. S. 649, 665 (1944).

Booth has not even an arguable basis in the common-law background that led up to the Eighth Amendment, in any longstanding societal tradition, or in any evidence that present society, through its laws or the actions of its juries, has set its face against considering the harm caused by criminal acts in assessing responsibility. The Court's opinion in *Booth*, like today's opinion, did not even try to assert the contrary. We provide far greater reassurance of the rule of law by eliminating than by retaining such a decision.

I respectfully dissent.

NEWMAN-GREEN, INC. *v.* ALFONZO-LARRAIN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 88–774. Argued April 24, 1989—Decided June 12, 1989

Title 28 U. S. C. § 1332 confers diversity jurisdiction in the district courts when a citizen of one State sues both aliens and citizens of a State different from the plaintiff's, § 1332(a)(3), and when a citizen of a State sues aliens only, § 1332(a)(2). Petitioner, an Illinois corporation, invoking jurisdiction under § 1332(a)(3), brought a state-law contract action in the District Court against a Venezuelan corporation and, as joint and several guarantors of royalty payments due under the agreement, four Venezuelan citizens and one Bettison, a United States citizen domiciled in Venezuela. After several years of litigation, the District Court, *inter alia*, granted partial summary judgment for the guarantors. A Court of Appeals panel found that Bettison's status as a United States citizen not domiciled within a State destroyed § 1332(a)(3) jurisdiction, but granted petitioner's motion to dismiss him from the suit, thereby producing complete diversity under § 1332(a)(2). The court then decided the merits. The Court of Appeals en banc reversed, concluding that neither 28 U. S. C. § 1653—which provides that "[d]efective allegations of jurisdiction may be amended . . . in the trial or appellate courts"—nor Federal Rule of Civil Procedure 21—which provides that a court may add or drop parties at any stage of the action on such terms as are just—empowers appellate courts to dismiss a dispensable party who spoils statutory diversity jurisdiction. However, recognizing that Rule 21 permits district courts to drop dispensable nondiverse parties, the court remanded the case to the District Court for a determination whether it would be prudent to drop Bettison from the litigation.

Held: A court of appeals has the authority to grant a motion to dismiss a dispensable nondiverse party and need not remand the case to the district court for dismissal in that court's discretion. Pp. 830–838.

(a) Since § 1653 speaks of amending jurisdictional *allegations*, it would apply if petitioner had made an incorrect statement about jurisdiction that actually existed, but it does not apply where, as here, there are defects in the jurisdictional facts themselves. This interpretation is consistent with § 1653's legislative history and the language of its predecessor statute, as well as the view of every Court of Appeals that has considered § 1653's scope. Pp. 830–832.

(b) Virtually every modern Court of Appeals faced with this issue has concluded that it has the authority to dismiss a dispensable nondiverse party by virtue of Rule 21. Furthermore, this Court has exercised similar authority both under Rule 21, see *Mullaney* v. *Anderson*, 342 U. S. 415, and prior to the enactment of the Federal Rules. See *Carneal* v. *Banks*, 10 Wheat. 181. Other early appellate courts relied for their authority to dismiss a nondiverse party on § 32 of the Judiciary Act of 1789 or on the courts' own inherent powers. This Court declines to disturb that deeply rooted understanding of appellate power, particularly when requiring dismissal of the suit after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants awaiting judicial attention. Here, the practicalities weigh heavily in favor of the decision to dismiss Bettison since, if the suit were dismissed, petitioner would be compelled to refile in the District Court against the diverse parties and proceed to a preordained judgment merely for the sake of a hypertechnical jurisdictional purity. Although an appellate court should exercise its authority sparingly, carefully considering whether dismissal of the nondiverse party will prejudice any of the other parties and remanding to the district court when appropriate, this Court declines to erect a *per se* rule that the district court must first make such a determination in every case. Here, none of the parties will be harmed by Bettison's dismissal, since his presence did not provide petitioner with a tactical advantage; since he was not indispensable to the suit; and since any possible prejudice to him personally was eliminated when the Court of Appeals panel terminated the litigation against him with prejudice. Pp. 832–838.

854 F. 2d 916, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 839.

Phil C. Neal argued the cause for petitioner. With him on the briefs were *Rowe W. Snider* and *Michael D. Sher*.

Frank K. Heap argued the cause for respondents. With him on the brief were *Charles G. Albert* and *William L. Barr, Jr.*

JUSTICE MARSHALL delivered the opinion of the Court.

We decide today that a court of appeals may grant a motion to dismiss a dispensable party whose presence spoils statutory diversity jurisdiction.

I

Petitioner Newman-Green, Inc., an Illinois corporation, brought this state-law contract action in District Court against a Venezuelan corporation, four Venezuelan citizens, and William L. Bettison, a United States citizen domiciled in Caracas, Venezuela. Newman-Green's complaint alleged that the Venezuelan corporation had breached a licensing agreement, and that the individual defendants, joint and several guarantors of royalty payments due under the agreement, owed money to Newman-Green. Several years of discovery and pretrial motions followed. The District Court ultimately granted partial summary judgment for the guarantors and partial summary judgment for Newman-Green. 590 F. Supp. 1083 (ND Ill. 1984). Only Newman-Green appealed.

At oral argument before a panel of the Seventh Circuit Court of Appeals, Judge Easterbrook inquired as to the statutory basis for diversity jurisdiction, an issue which had not been previously raised either by counsel or by the District Court Judge. In its complaint, Newman-Green had invoked 28 U. S. C. § 1332(a)(3), which confers jurisdiction in the District Court when a citizen of one State sues both aliens and citizens of a State (or States) different from the plaintiff's. In order to be a citizen of a State within the meaning of the diversity statute, a natural person must both be a citizen of the United States *and* be domiciled within the State. See *Robertson* v. *Cease*, 97 U. S. 646, 648–649 (1878); *Brown* v. *Keene*, 8 Pet. 112, 115 (1834). The problem in this case is that Bettison, although a United States citizen, has no domicile in any State. He is therefore "stateless" for purposes of § 1332(a)(3). Subsection 1332(a)(2), which confers jurisdiction in the District Court when a citizen of a State sues aliens only, also could not be satisfied because Bettison is a United States citizen.

When a plaintiff sues more than one defendant in a diversity action, the plaintiff must meet the requirements of the diversity statute for *each* defendant or face dismissal. *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806).[1] Here, Bettison's "stateless" status destroyed complete diversity under § 1332(a)(3), and his United States citizenship destroyed complete diversity under § 1332(a)(2). Instead of dismissing the case, however, the Court of Appeals panel granted Newman-Green's motion, which it had invited, to amend the complaint to drop Bettison as a party, thereby producing complete diversity under § 1332(a)(2). 832 F. 2d 417 (1987). The panel, in an opinion by Judge Easterbrook, relied both on 28 U. S. C. § 1653 and on Rule 21 of the Federal Rules of Civil Procedure as sources of its authority to grant this motion. The panel noted that, because the guarantors are jointly and severally liable, Bettison is not an indispensable party and dismissing him would not prejudice the remaining guarantors. 832 F. 2d, at 420, citing Fed. Rule Civ. Proc. 19(b). The panel then proceeded to the merits of the case, ruling in Newman-Green's favor in large part but remanding to allow the District Court to quantify damages and to resolve certain minor issues.[2]

The Court of Appeals granted the remaining guarantors' motion for rehearing en banc and reversed the panel decision. 854 F. 2d 916 (1988). Writing for the en banc majority, Judge Posner concluded that neither § 1653 nor Rule 21 empowers appellate courts to dismiss a dispensable party whose presence spoils statutory diversity jurisdiction. The court did not, however, order the dismissal of the lawsuit. Recognizing that Rule 21 permits district courts to drop a dispensable nondiverse party, the court remanded the case to the District Court for it to determine whether it would be prudent to drop Bettison from the litigation. Judge Easterbrook, joined by the other two members of the original panel, wrote a dissenting opinion in which he elaborated on the panel opinion. *Id.*, at 927.

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[1] This complete diversity requirement is based on the diversity statute, not Article III of the Constitution. *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U. S. 523, 530–531 (1967).

[2] The panel's merits determination has no bearing on the jurisdictional question presently before us. We note nonetheless that the panel decision, combined with the partial summary judgment granted Newman-Green in the District Court, provided the guarantors with a strong incentive to have the case dismissed for want of jurisdiction.

Unlike the Seventh Circuit, the Courts of Appeals for the Second, Third, Ninth, and District of Columbia Circuits have held that appellate courts have the power to dismiss jurisdictional spoilers like Bettison.[3] We granted Newman-Green's petition for certiorari in order to resolve this conflict, 488 U. S. 1003 (1989), and now reverse.

II

The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed. See, *e. g.*, *Smith* v. *Sperling*, 354 U. S. 91, 93, n. 1 (1957). Like most general principles, however, this one is susceptible to exceptions, and the two that are potentially applicable here are reflected in 28 U. S. C. § 1653 and Rule 21 of the Federal Rules of Civil Procedure. We discuss each potential exception in turn.

A

Title 28 U. S. C. § 1653, enacted as part of the revision of the Judicial Code in 1948, provides that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." At first blush, the language of this provision appears to cover the situation here, where the complaint is amended to drop a nondiverse party in order to preserve statutory jurisdiction. But § 1653 speaks of amending "*allegations* of jurisdiction," which suggests that it addresses only incorrect statements about jurisdiction that actually exists, and not defects in the jurisdictional facts themselves. Under this reading of the statute, which we believe is correct, § 1653 would apply if Bettison were, in fact, domiciled in a State other than Illinois or was, in fact, not a United States citizen, but the complaint did not so allege. It does not apply to the instant situation, where diversity jurisdiction does not, in fact, exist.

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[3] See, *e. g.*, *Long* v. *District of Columbia*, 261 U. S. App. D. C. 1, 8–9, 820 F. 2d 409, 416–417 (1987); *Continental Airlines, Inc.* v. *Goodyear Tire & Rubber Co.*, 819 F. 2d 1519, 1523, and n. 3 (CA9 1987); *Caspary* v. *Louisiana Land & Exploration Co.*, 725 F. 2d 189, 191–192 (CA2 1984) *(per curiam)*; *Underwood* v. *Maloney*, 256 F. 2d 334, 339 (CA3), cert. denied, 358 U. S. 864 (1958); cf. *Reed* v. *Robilio*, 376 F. 2d 392, 394 (CA6 1967).

This interpretation of § 1653 is consistent with the language of its predecessor statute, enacted in 1915, which expressly limited jurisdictional amendments to cases in which diversity jurisdiction "in fact existed at the time the suit was brought or removed, though defectively alleged." § 274(c), Act of Mar. 3, 1915, 38 Stat. 956, 28 U. S. C. § 399 (1946 ed.). There is nothing in the 1948 legislative history to indicate that, in changing the wording of this statute, Congress intended to abandon the limitation just quoted. On the contrary, the only legislative guide available—the Revision Note to § 1653—explains that the predecessor statute was changed solely to expand the power to cure defective allegations of jurisdiction from diversity cases to all cases. Historical and Revision Notes to 28 U. S. C. § 1653. Other than that, "[c]hanges were made in phraseology." *Ibid.* Surely a change that would empower federal courts to amend a complaint so as to produce jurisdiction where none actually existed before is much more than a change in phraseology.[4]

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[4] Although Revision Notes are not conclusive evidence of congressional intent, we have previously stated that no change in law should be presumed from the 1948 revision of the Judicial Code "unless an intent to make such changes is clearly expressed." *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 227 (1957). No such intent is clearly expressed with regard to § 1653.

Furthermore, every Court of Appeals that has considered the scope of § 1653 has held that it allows appellate courts to remedy inadequate jurisdictional allegations, but not defective jurisdictional facts.[5] We decline to reject this longstanding interpretation of the statute.

B

We turn next to the other source of authority discussed by the Court of Appeals, Rule 21 of the Federal Rules of Civil Procedure, which provides that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." As both the en banc majority and dissent recognized below, it is well settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered.[6] Although the Federal Rules of Civil Procedure strictly apply only in the district courts, Fed. Rule Civ. Proc. 1, the policies informing Rule 21 may apply equally to the courts of appeals. The narrow question before us, therefore, is whether a court of appeals may do what a district court can do and dismiss a dispensable nondiverse party itself, or whether a court of appeals must remand the case to the district court, leaving it to the district court's discretion to dismiss the party?

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[5] See, *e. g., Rockwell Int'l Credit Corp.* v. *United States Aircraft Ins. Group*, 823 F. 2d 302, 304 (CA9 1987); *Sarnoff* v. *American Home Products Corp.*, 798 F. 2d 1075, 1079 (CA7 1986); *Aetna Casualty & Surety Co.* v. *Hillman*, 796 F. 2d 770, 775–776 (CA5 1986); *Boelens* v. *Redman Homes, Inc.*, 759 F. 2d 504, 512 (CA5 1985); *Pressroom Unions-Printers League Income Security Fund* v. *Continental Assurance Co.*, 700 F. 2d 889, 893 (CA2), cert. dism'd, 463 U. S. 1233 (1983); *Field* v. *Volkswagenwerk AG*, 626 F. 2d 293, 305–306 (CA3 1980); cf. *Carson* v. *Allied News Co.*, 511 F. 2d 22, 24 (CA7 1975); *Thomas* v. *Anderson*, 223 F. 41, 43 (CA8 1915).

[6] See, *e. g., Fritz* v. *American Home Shield Corp.*, 751 F. 2d 1152, 1154–1155 (CA11 1985); *Publicker Industries, Inc.* v. *Roman Ceramics Corp.*, 603 F. 2d 1065, 1068–1069 (CA3 1979); *Caperton* v. *Beatrice Pocahontas Coal Co.*, 585 F. 2d 683, 691–692, and n. 23 (CA4 1978).

Almost every modern Court of Appeals faced with this issue has concluded that it has the authority to dismiss a dispensable nondiverse party by virtue of Rule 21.[7] As with § 1653, we are reluctant to disturb this well-settled judicial construction, particularly when there is no evidence that this authority has been abused by the courts of appeals (or the district courts for that matter). Furthermore, we have ourselves exercised a similar authority under Rule 21. In *Mullaney* v. *Anderson*, 342 U. S. 415 (1952), the defendant first questioned the plaintiff-union's standing to bring suit when the case reached this Court. Relying explicitly on Rule 21, we avoided deciding the standing issue by granting the union's motion to add as parties two of its members. Although we did not discuss extensively Rule 21's applicability in the appellate setting, we did note that the change in the parties would not have "affected the course of the litigation" if it had occurred at some earlier point, and would not "embarrass the defendant." *Id.*, at 417. The Court further remarked that dismissing the petition and thereby requiring the plaintiffs to start over in the District Court "would entail needless waste and runs counter to effective judicial administration." *Ibid.* Finally, the Court expressed confidence that amendments at such a late stage "will rarely come into play." *Ibid;* cf. *Rogers* v. *Paul*, 382 U. S. 198, 198–199 (1965) *(per curiam)*.[8]

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[7] See, *e. g.*, *Long*, 820 F. 2d, at 416–417; *Ross* v. *Int'l Brotherhood of Electrical Workers*, 634 F. 2d 453, 456–457 (CA9 1980); *Fidelity & Casualty Co.* v. *Reserve Ins. Co.*, 596 F. 2d 914, 918 (CA9 1979); *Underwood*, 256 F. 2d, at 339; cf. *Caspary*, 725 F. 2d, at 191–192 (relying on Fed. Rule Civ. Proc. 15). Other courts have remanded the case to the district court with mandatory instructions to allow an amendment dismissing the nondiverse party in order to preserve diversity jurisdiction. See, *e. g.*, *Jaser* v. *New York Property Ins. Underwriting Assn.*, 815 F. 2d 240, 244 (CA2 1987). The cases holding that appellate courts are powerless to remedy such jurisdictional defects are few and far between. See, *e. g.*, *Field*, *supra*, at 306; *Dollar S. S. Lines, Inc.* v. *Merz*, 68 F. 2d 594, 595 (CA9 1934).

The motion granted in *Mullaney* represented the exercise of an appellate power that long predates the enactment of the Federal Rules. In *Anonymous*, 1 F. Cas. 996, 997 (No. 444) (CC Mass. 1812), Justice Story, sitting as Circuit Justice, wrote that "[t]here is then, in the nature of an appellate jurisdiction, nothing which forbids the granting of amendments." Justice Story derived this appellate power from "the course of the common law," which permitted "'the superior court . . . [to] make such amendments, as the court below may.'" *Ibid.*, quoting *King* v. *Ponsonby*, 1 Wils. 303, 95 Eng. Rep. 631 (K. B. 1751); see also 1 F. Cas, at 997, citing *Pease* v. *Morgan*, 7 Johns. 468, 469 (N. Y. 1811). He also looked to § 32 of the Judiciary Act of 1789, which provided that a federal court "may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the said courts respectively shall in their discretion and by their rules prescribe." 1 Stat. 91, formerly codified at 28 U. S. C. § 777 (1946 ed.).[9] He cautioned, however, that this amendment power should be used in such a way that "no unfair advantage shall be taken by one party, and no oppression practised by the other." 1 F. Cas., at 998.

While Justice Story's opinion dealt generally with the amendment power of appellate courts, Chief Justice Marshall's opinion for this Court in *Carneal* v. *Banks*, 10 Wheat. 181 (1825), dealt with the issue at hand—the power of appellate courts to grant motions to dismiss dispensable nondiverse parties. The case involved a suit by plaintiff Banks against two groups of defendants, the heirs of Harvie and the heirs of Carneal. Only the heirs of Carneal had citizenship diverse from the plaintiff. After noting this jurisdictional problem, the Court stated: "The bill . . . as to Harvie's heirs, may be dismissed, without in any manner affecting the suit against Carneal's heirs. That they have been improperly made defendants in his bill, cannot affect the jurisdiction of the Court as between those parties who are properly before it." *Id.*, at 188. The Court predicated this ruling, in part, on the fact that it was not "indispensable to bring Harvie's heirs before the Court." *Ibid.* Although the Court did not state explicitly whether the Circuit Court in which the case arose had dismissed Harvie's heirs, a review of the Circuit Court's opinion in *Carneal* reveals that the lower court never dismissed the nondiverse parties.[10] Thus, this Court itself dismissed the nondiverse parties while acting in an appellate capacity.

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[8] *Mullaney* v. *Anderson*, 342 U. S. 415 (1952), cannot be explained as a case involving a technical change to identify the real parties in interest. The addition of the union members was considered necessary to establish the existence of a justiciable case. At the time, it was not clear that unions had standing to sue on behalf of their members. See *NAACP* v. *Button*, 371 U. S. 415, 428 (1963).

[9] Section 32 of the Judiciary Act was repealed with the passage of the Federal Rules of Civil Procedure. Act of June 25, 1948, Pub. L. 773, 62 Stat. 869, 993.

By contrast, *Horn* v. *Lockhart*, 17 Wall. 570 (1873), clearly involved a trial court's decision to dismiss dispensable nondiverse parties. In approving such action, however, the Court used language that is strikingly reminiscent of that employed in *Carneal:* "[T]he question always is, or should be, when objection is taken to the jurisdiction of the court by reason of the citizenship of some of the parties, whether . . . they are indispensable parties, for if their interests are severable and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained and the suit dismissed as to them." 17 Wall., at 579. This similarity of language is not surprising; the considerations implicit in a trial court's exercise of this power are equally applicable when an appellate court exercises the same power. Moreover, once it is recognized that trial courts have this amendment power, it is exceedingly difficult to argue that a similar power exercised by appellate courts presents the risk of jurisdiction retroactively conferred.

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[10] We recognize that copies of the Circuit Court opinion in *Carneal* are not easily available; however, a handwritten copy resides in the National Archives.

Although these 19th-century cases were decided in a procedural era different from our own, it is apparent that the weight of authority favored the view that appellate courts possessed the authority to grant motions to dismiss dispensable nondiverse parties.[11] Courts relied then on § 32 of the Judiciary Act of 1789 or on the inherent power of appellate courts. Today courts rely on *Mullaney* or Federal Rule 21. We decline to disturb that deeply rooted understanding of appellate power, particularly when requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention. See *Mullaney*, 342 U. S., at 417. Appellate-level amendments to correct jurisdictional defects may not be the most intellectually satisfying approach to the spoiler problem, but, as Judge Posner eloquently noted, because "law is an instrument of governance rather than a hymn to intellectual beauty, some consideration must be given to practicalities." 854 F. 2d, at 925.

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[11] In *Kennedy* v. *Bank of Georgia*, 8 How. 586 (1850), the Court rejected the argument that its prior judgment in the same case was void for want of jurisdiction because it lacked the power to accept a stipulation amending the pleadings to reflect correctly the existence of diversity jurisdiction. In so doing, the Court stated: "[I]t has been the practice of this court, where amendments are necessary, to remand the cause to the Circuit Court for that purpose. The only exception to this rule has been, where counsel on both sides have agreed to the amendment." *Id.*, at 611. This passage suggests that the Court viewed this limitation on its amendment power as *discretionary*. There is no indication that the Court thought it lacked the *authority* to permit such amendments. On the contrary, in discussing the proper course of action in the case, the Court incorporated Justice Story's broad view of the common-law power of appellate courts to accept amendments. See *ibid.*, citing *Anonymous*, 1 F. Cas. 996 (No. 444) (CC Mass. 1812). Although there is language in several 19th-century cases that can be read to suggest that the Court did not have the authority to allow such amendments, see *Denny* v. *Pironi*, 141 U. S. 121, 124 (1891); *Menard* v. *Goggan*, 121 U. S. 253, 254 (1887); *Peper* v. *Fordyce*, 119 U. S. 469, 471 (1886); *Halsted* v. *Buster*, 119 U. S. 341, 342 (1886); *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237, 240 (1886), we believe these cases are best understood as examples of the discretionary practice referred to in *Kennedy* v. *Bank of Georgia, supra*. See *Norton* v. *Larney*, 266 U. S. 511, 515–516 (1925).

In this case, the practicalities weigh heavily in favor of the decision made by the Court of Appeals panel to grant Newman-Green's motion to dismiss Bettison as a party. If the entire suit were dismissed, Newman-Green would simply refile in the District Court against the Venezuelan corporation and the four Venezuelans and submit the discovery materials already in hand. The case would then proceed to a preordained judgment. See *id.*, at 932, 939–940 (Easterbrook, J., dissenting).[12] Newman-Green should not be compelled to jump through these judicial hoops merely for the sake of hypertechnical jurisdictional purity.

Although we hold that the courts of appeals have the authority to dismiss a dispensable nondiverse party, we emphasize that such authority should be exercised sparingly. In each case, the appellate court should carefully consider whether the dismissal of a nondiverse party will prejudice any of the parties in the litigation. It may be that the presence of the nondiverse party produced a tactical advantage for one party or another. If factual disputes arise, it might be appropriate to remand the case to the district court, which would be in a better position to make the prejudice determination. But we decline to erect a *per se* rule that the district court must first make such a determination in every case.

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[12] The en banc Court of Appeals thought it would require a "crystal ball" to determine the fate of this litigation in the District Court upon remand, speculating that Newman-Green might abandon its federal-court action and move to state court or even to a Venezuelan court. 854 F. 2d, at 925. We agree with Judge Easterbrook, however, that "[a] great many zeros precede the first significant digit in the probability of this." *Id.*, at 940 (dissenting opinion). As he cogently explained:

> "After the panel of our court flagged the jurisdictional problem, [Newman-Green] had to decide what it wanted to do. [Newman-Green] had lost the bulk of its case in the district court (although it had won some $200,000 on a portion of the case no longer in dispute). It was guaranteed a new run at the subject in state court, against all defendants, by retaining Bettison as a defendant. [Newman-Green] instead filed a motion to dismiss Bettison and take its chances on the merits. If it was willing to pursue this suit in federal court without Bettison when all it had to show for itself was a loss, and to abandon any hope of reaching Bettison's assets if it should prevail, what is it going to do now that it has an opinion in its favor on the merits? Go to state court, where things could get worse but are not likely to get better? If this suit is dismissed, it will be refiled in federal court. The only question is just how much time will be lost along the way." *Ibid.*

In the instant case, it is evident that none of the parties will be harmed by Bettison's dismissal. First, Bettison's presence did not provide Newman-Green with a tactical advantage. Discovery directed to Bettison while he was a party would have been available even if he had not been a party. See, *e. g.*, Fed. Rule Civ. Proc. 30(a); 28 U. S. C. § 1783. Second, given that all of the guarantors (including Bettison) are jointly and severally liable, it cannot be argued that Bettison was indispensable to the suit. Fed. Rule Civ. Proc. 19(b); see 854 F. 2d, at 938 (Easterbrook, J., dissenting). The only person who faces any prejudice is Bettison himself, who has participated in this litigation from the start, and who would face the possibility of suit in a state or Venezuelan court. The panel solved this problem by terminating the litigation against Bettison with prejudice, thus leaving the other guarantors with the burden of pursuing Bettison to obtain contribution or indemnity. 832 F. 2d, at 420. The panel's disposition was entirely appropriate. Nothing but a waste of time and resources would be engendered by remanding to the District Court or by forcing these parties to begin anew.

III

For the reasons stated, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, dissenting.

Our colleagues on the Court of Appeals disagree about whether 28 U. S. C. § 1653, which provides that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate court[,]" empowers a court of appeals to dismiss a party who spoils complete diversity. The Court holds today that § 1653 does not give an appellate court the power to cure actual defects in jurisdiction, but extends only to defects in its allegation. See *ante*, at 830. I agree that this is the correct interpretation of § 1653.

That should end the case. For if Congress thought it necessary to provide by affirmative statutory grant the rather ministerial power to cure defective allegations in jurisdiction, the more awesome power of curing actual defects in jurisdiction ought not be presumed, absent a statutory grant just as explicit. The balance of the Court's opinion in effect demonstrates that no such clear source of authority can be found to rebut the strong negative implication from the Court's interpretation of § 1653. The Court nevertheless holds that the power in question exists, though it cannot provide us with its precise location.

As an initial matter, it is disturbing that the Court does not address in a substantive way the grave, brooding question whether Federal Rule of Civil Procedure 21 affords even the district courts the power to confer jurisdiction retroactively by dismissing a nondiverse party. On this critical point, the Court states only that this question is "well settled" in the lower courts. See *ante*, at 832. But it has never been the rule that federal courts, whose jurisdiction is created and limited by statute, see *Finley* v. *United States*, *ante*, at 547–548, acquire power by adverse possession. Indeed, I have some doubts that Rule 21 provides this power to district courts. For one thing, it is important to note that Rule 21 governs only misjoinder and nonjoinder. But that is not what is at issue in this case. There is no claim here that

Bettison is an improper party to this action, only that his presence defeats federal jurisdiction. It must be remembered, moreover, that Federal Rule of Civil Procedure 82 expressly provides that the other Rules must not be construed to extend or limit the jurisdiction of the district courts. Since dismissing a nondiverse party confers jurisdiction retroactively on the district court, it is questionable whether relying on Rule 21 is consistent with Rule 82's clear admonition. Finally, 28 U. S. C. § 1653 governs the power of not only appellate courts but also trial courts, and if, as the Court holds, that section confers only the authority to cure defective allegations of jurisdiction, then the same negative implication which I discuss above clouds the district courts' ability to cure actual jurisdictional defects under the vague authority of Rule 21. The charming utility of the *nunc pro tunc* device cannot obscure its outright fiction.

Even on the assumption, however, that Rule 21 provides the district courts with the necessary authority to dismiss a nondiverse party at any stage of the litigation for the sole purpose of creating jurisdiction where none existed before, it is just not possible to rely on that Rule as the source of authority for appellate courts. For notwithstanding some rather odd language to the contrary in *Mullaney* v. *Anderson*, 342 U. S. 415, 417 (1952) ("Rule 21 will *rarely* come into play at this [*i. e.*, in the Supreme Court] stage of a litigation") (emphasis added), it is well settled that "the Federal Rules of Civil Procedure . . . apply only in the federal district courts." *Automobile Workers* v. *Scofield*, 382 U. S. 205, 217, n. 10 (1965).

The two 19th-century cases relied upon by the Court, *Horn* v. *Lockhart*, 17 Wall. 570 (1873), and *Carneal* v. *Banks*, 10 Wheat. 181 (1825), do not establish the authority of an appellate court to dismiss a nondiverse party to preserve jurisdiction. Both the majority and the dissent in the Court of Appeals recognized that, at most, *Horn* speaks of the powers of a trial court, see 854 F. 2d 916, 921 (1988) (Posner, J.); *id.*, at

931 (Easterbrook, J.), and the Court concedes as much, see *ante*, at 835–836. Nor does *Carneal* establish in any explicit way, or even by necessary inference, the authority of an appellate court to preserve jurisdiction by dismissing a nondiverse party who defeats complete diversity.

The majority's reliance on *Carneal* proceeds from a premise that is most questionable. It assumes that *Carneal* involved a single action in which this Court dismissed on its own the nondiverse parties. Judge Posner, however, observed that the Court in *Carneal* may have in fact "treated the suit as if it were two suits, one satisfying the requirement of complete diversity, the other dismissable and dismissed." 854 F. 2d, at 921. Judge Posner, perhaps, understated his own case. *Carneal* involved a contract in which the plaintiff, Banks, "agreed to transfer to Carneal the right of the said Banks in 30,000 acres of land purchased by him from John Harvie," in exchange for which Carneal promised to convey to Banks "a tract of 2,000 acres of land on Green River." 10 Wheat., at 182. Banks claimed that "Carneal was guilty of fraud in pretending to have a good title to the said 2,000 acres of land." *Id.*, at 182–183. Because the contract involved a conveyance of the 30,000 acres from Harvie to Carneal, in order for Banks to obtain complete relief, he prayed both "that the contract [between Carneal and Banks] . . . be rescinded" and "that the heirs of John Harvie . . . , in whom the legal title to the said 30,000 acres remains, . . . be decreed to convey the same to [Banks]." *Id.*, at 183. The jurisdictional problem was that, although there was complete diversity between Banks and Carneal's heirs, there was no diversity between Banks and Harvie's heirs. See *id.*, at 187–188. The Court appears to have treated the claims against Harvie's heirs (the nondiverse parties) as a separate suit which in no way affected jurisdiction over Banks' suit against Carneal's heirs. The Court stated: "If the validity of this objection [the lack of diversity], so far as respects Harvie's heirs, be unquestionable, it cannot affect the *suit* against Carneal's heirs . . . ." *Id.*, at 188 (emphasis added). Because the Court concluded that Harvie's heirs were not indispensable to the suit against Carneal's heirs, the Court held that "[t]he bill . . . , as to Harvie's heirs, may be dismissed without in any manner affecting the *suit* against Carneal's heirs." *Ibid.* (emphasis added). The more plausible interpretation of *Carneal* is that the Court did not dismiss the nondiverse parties in a single action and then proceed to the merits, but rather dismissed the suit against the nondiverse parties for want of jurisdiction and went on to decide the merits of the separate suit that met the requirements of complete diversity. Seen in this light, *Carneal* does not establish the authority of an appellate court to preserve jurisdiction by dismissing a nondiverse party, but rather evidences only the usual appellate power to dismiss an action in which the federal courts lack jurisdictional authority.

There is, moreover, a more basic reason not to place heavy reliance on *Carneal* and *Horn*. As the Court concedes, these cases "were decided in a procedural era different from our own," *ante*, at 836. The powers of the district courts and courts of appeals are now governed by Federal Rules of Procedure and various other provisions in Title 28. In my view, these cases do not establish an authority in the appellate courts so clear that it survives the plain negative implication from the one statutory provision on point (§ 1653). Whatever may be implied from *Carneal*, the present statutory authority permits appellate courts to cure only defective allegations of jurisdiction and not jurisdictional flaws.

I am not at all persuaded, either, that practical considerations in the case warrant our holding that courts of appeals have the power to dismiss nondiverse parties. The dissent in the Court of Appeals, and the opinion for the Court here, each assume it would be quite a waste to remand the case to the District Court so that it may determine whether an amendment to the complaint ought to be allowed. But if, as the Court and the dissent below contend, there would be no prejudice to respondents from amending the complaint to dismiss the nondiverse party, how long could it take for the District Court to decide this and reenter its judgment? I should think a limited remand for this purpose, with the appellate panel to resume jurisdiction if amendment is permitted, would be most expeditious. The overriding practical consideration is that the District Court, which managed the process of discovery and the presentation of evidence at trial, is in the much better position to determine whether the dismissal of the nondiverse party, after judgment, would prejudice the defendant.

For these reasons, and with all due respect, I dissent from the opinion and judgment of the Court.

CALIFORNIA STATE BOARD OF EQUALIZATION *v.* SIERRA SUMMIT, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88-681. Argued April 19, 1989—Decided June 12, 1989

In holding that a Bankruptcy Court's injunction against petitioner Board of Equalization's assessment of a state sales tax upon the proceeds of a trustee's liquidation sale of inventory also barred the collection of a use tax from the purchaser's lessees, the Court of Appeals rejected petitioner's argument that it had wrongly decided *California State Board of Equalization* v. *Goggin*, 245 F. 2d 44 *(Goggin II)*. There, the court had held (1) that a tax on liquidation sales places a burden on the federal function of the bankruptcy court and violates principles of intergovernmental tax immunity, and (2) that 28 U. S. C. § 960—which specifically authorizes the States to impose taxes on a bankruptcy trustee's business operations—sets forth the sole area in which the States can impose a tax of any type and negates by implication their power to tax bankruptcy liquidations.

Held: Neither the doctrine of intergovernmental tax immunity nor § 960 proscribes the imposition of a sales or use tax on a bankruptcy liquidation sale. Pp. 847–854.

(a) Under this Court's recent decisions, the intergovernmental tax immunity doctrine prohibits the States from directly taxing the United States, or an agency or instrumentality so closely related to the Government that the two cannot realistically be viewed as separate entities insofar as the activity being taxed is concerned, but permits States to tax private parties with whom the United States does business even though the financial burden falls on the Government, as long as the tax does not discriminate against the United States or those with whom it deals. Thus, whatever immunity the bankruptcy estate once enjoyed from a tax on its operations has long since eroded. Such a tax does not discriminate against bankruptcy trustees or those with whom they deal, since a purchaser at a judicial sale is only required to pay the same tax that he would have been bound to pay had he purchased from anyone else. Nor is the bankruptcy trustee so closely connected to the Federal Government that the two cannot be viewed as separate entities. The trustee is the representative of the debtor's estate, not an arm of the Government; and the tax is an administrative expense of the debtor, not of the Government. There is no material distinction between those municipal and state withholding and property taxes on the bankruptcy trustee which have been upheld, see *Otte* v. *United States*, 419 U. S. 43, 52–54; *Swarts* v. *Hammer*, 194 U. S. 441, 444, and the tax on the liquidation sale presented here. Pp. 848–850.

(b) The *Goggin II* court's reading of § 960 is contrary to this Court's general approach to claims that the States' power to tax has been preempted, to the plain meaning and legislative history of the statutory provision, and to the structure of the Bankruptcy Code. Section 960 is not a clear expression of an exemption from state taxation. Rather, it evinces Congress' intention that a State be permitted to tax a bankruptcy estate notwithstanding any intergovernmental tax immunity objection that might be interposed and that, as a matter of federal law, a business in receivership, or being conducted under court order, should be subject to the same tax liability as the owner had he been in possession of, and operating, the enterprise. Pp. 850–854.

847 F. 2d 570, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 854.

Robert F. Tyler, Supervising Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs was *John K. Van de Kamp*, Attorney General.

David Ray Jenkins argued the cause and filed a brief for respondent.*

JUSTICE STEVENS delivered the opinion of the Court.

Enmeshed in a tangled skein of procedural and state-law issues is a ruling on an important federal question that was critical to the decision of the Court of Appeals in this case. The court's ultimate holding was that a Bankruptcy Court's in-

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**Benna Ruth Solomon*, *Beate Bloch*, and *Thomas D. Goldberg* filed a brief for The National Governors' Association et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the First National Bank of Boston et al. by *Frederick A. Richman*, *M. Randall Oppenheimer*, *Alan Rader*, and *Daniel M. Glosband;* and for Kenneth L. Spears, Trustee, Hughes Drilling Co. by *David W. Lee* and *Gregory A. McKenzie*.

junction against the assessment of a state sales tax upon the proceeds of a trustee's liquidation sale of an inventory of skis also barred the collection of a use tax from the purchaser's lessees. In the process of reaching its decision, the Ninth Circuit rejected an argument that a case well known to California bankruptcy lawyers as "*Goggin II*"[1] was wrongly decided. The three-judge panel that heard the case concluded that it was not within its power—"and not within its heart—to change a rule of this circuit that has been in force for over thirty years." *In re China Peak Resort*, 847 F. 2d 570, 572 (1988). Because the rule of "*Goggin II*" conflicts with the rule applied in other Circuits,[2] and because we have both the power and the duty to resolve the conflict, we granted certiorari. 488 U. S. 992 (1988).[3]

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[1] *California State Board of Equalization* v. *Goggin*, 245 F. 2d 44 (CA9), cert. denied, 353 U. S. 961 (1957). The case known as "*Goggin I*" is *California State Board of Equalization* v. *Goggin*, 191 F. 2d 726 (CA9 1951), cert. denied, 342 U. S. 909 (1952).

[2] Compare *In re Hatfield Construction Co.*, 494 F. 2d 1179 (CA5 1974) (holding that sales tax can be imposed on liquidation sale); *In re Leavy*, 85 F. 2d 25 (CA2 1936) (same), with *In re Cusato Brothers Int'l, Inc.*, 750 F. 2d 887 (CA11) (holding that bankruptcy trustee is not liable for excise taxes), cert. denied *sub nom. Florida* v. *Great American Bank of Broward County*, 472 U. S. 1010 (1985). See also *In re Warmings A. G. Food Center*, 50 B. R. 748 (Bkrtcy. Ct. Me.), summarily aff'd, 782 F. 2d 1024 (CA1 1985); *In re Sunrise Construction Co.*, 39 B. R. 668 (Wyo. 1984); *In re Hughes Drilling Co.*, 75 B. R. 196 (Bkrtcy. Ct. WD Okla. 1987); *In re Hubs Repair Shop, Inc.*, 28 B. R. 858 (Bkrtcy. Ct. ND Iowa 1983) (all holding that States can tax liquidation sales), and *In re Sheldon's Inc. of Maine*, 28 B. R. 568 (Bkrtcy. Ct. Me. 1983); *In re Rhea*, 17 B. R. 789 (Bkrtcy. Ct. WD Okla. 1982) (holding that States cannot tax liquidation sales).

[3] In its brief on the merits, respondent argues that the judgment of the Bankruptcy Court that States may not impose taxes on a liquidation sale is res judicata and therefore not properly before us. Petitioner argued that the *Goggin* cases were incorrectly decided before the Court of Appeals, see Brief for Appellant in No. 87-2542 (CA9), pp. 28-33, however, and that court reached the merits of the question. At no time previous to its brief on the merits before this Court did respondent argue that the question

The *Goggin* cases concerned the attempt by the California State Board of Equalization, petitioner here, to assess sales and use taxes on a bankruptcy liquidation sale. In *Goggin I,* 191 F. 2d 726 (1951), cert. denied, 342 U. S. 909 (1952), the Court of Appeals for the Ninth Circuit rejected the Board's attempt to assess a nondiscriminatory sales tax imposed on retailers to a liquidation sale made by a bankruptcy trustee under court order. Although the court based its decision on a construction of state law that excluded the trustee from the definition of retailer, Judge Fee in concurrence wrote that the assessment constituted an unlawful tax upon court processes. Six years later, Judge Fee, writing for the Circuit panel in *Goggin II,* made those views law. 245 F. 2d 44, cert. denied, 353 U. S. 961 (1957). At issue was a California law which required the bankruptcy trustee to collect and remit use taxes imposed on the use of goods from a liquidation sale on which no sales tax had been paid. The court held the tax unlawful, finding that while it was nondiscriminatory it nonetheless burdened the "essential processes" of the bankruptcy court.

The *Goggin* opinions were based on two premises, each of which respondent argues supports the judgment here. First, the court held that a tax on liquidation sales places a burden on the federal function of the bankruptcy court and therefore violates principles of intergovernmental tax immunity first recognized in *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819). Second, it found that a federal statute specifically authorizing the States to impose taxes on business operations of the bankruptcy trustee negated by implication their power to tax bankruptcy liquidations. Neither argument is persuasive.

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might not be properly presented. In these circumstances we may decide the question decided by the Court of Appeals. See *Canton* v. *Harris,* 489 U. S. 378, 383–385 (1989); *Oklahoma City* v. *Tuttle,* 471 U. S. 808, 815–816 (1985); see also *Donovan* v. *City of Dallas,* 377 U. S. 408, 414 (1964).

The argument that a tax on a bankruptcy liquidation sale places an undue burden on a governmental operation derives from the once established view that a state tax on income or assets an individual receives from a contract with the Federal Government constituted a tax on the contract and thereby imposed a burden on governmental operations. See, *e. g.*, *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218 (1928); *Collector* v. *Day*, 11 Wall. 113 (1871); *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435 (1842); *Weston* v. *City Council of Charleston*, 2 Pet. 449 (1829). The Court drew a distinction between a tax imposed on a Government agent's property and a tax imposed on its operations. While the former was permissible, the latter was constitutionally proscribed. See, *e. g.*, *Railroad Co.* v. *Peniston*, 18 Wall. 5, 33 (1873); *McCulloch* v. *Maryland*, 4 Wheat., at 345; see also *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 163 (1937) (footnotes omitted) (Roberts, J., dissenting) ("No tax can be laid upon th[e] franchises or operations [of government instrumentalities], but their local property is subject to non-discriminating state taxation"). Thus, although this Court held as early as 1904 that States could impose a property tax on a bankruptcy estate, see *Swarts* v. *Hammer*, 194 U. S. 441 (1904), other courts reasonably concluded that the State could not tax the operations of the bankruptcy trustee. See, *e. g.*, *In re Flatbush Gum Co.*, 73 F. 2d 283 (CA2 1934), cert. denied *sub nom. New York* v. *Arnold*, 294 U. S. 713 (1935).

In *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937), however, this Court rejected the distinction between a tax on the property of an agent and a tax on the agent's operations. With the Court's decision in *Dravo Contracting*, "the doctrine of intergovernmental tax immunity started a long path in decline and [it] has now been 'thoroughly repudiated.'" *Cotton Petroleum Corp.* v. *New Mexico*, *ante*, at 174 (quoting *South Carolina* v. *Baker*, 485 U. S. 505, 520 (1988)). "[U]nder current intergovernmental tax immunity doctrine the States can never tax the United States directly but can tax any private parties with whom it does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals." *Id.*, at 523. Absolute tax immunity is appropriate only when the tax is on the United States itself "or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *United States* v. *New Mexico*, 455 U. S. 720, 735 (1982).

It is evident that whatever immunity the bankruptcy estate once enjoyed from taxation on its operations has long since eroded and that there is now no constitutional impediment to the imposition of a sales tax or use tax on a liquidation sale. There is no claim, nor could there be, that the tax discriminates against bankruptcy trustees or those with whom they deal. As Judge Augustus Hand observed on similar facts in 1936: "The purchaser at the judicial sale was only required to pay the same tax he would have been bound to pay if he had purchased from anyone else." *In re Leavy*, 85 F. 2d 25, 27 (CA2).[4] Nor is the bankruptcy trustee so closely connected to the Federal Government that the two "cannot realistically be viewed as separate entities." *United States* v. *New Mexico*, *supra*, at 735. The bankruptcy trustee is "the representative of the estate [of the debtor]," 11 U. S. C. § 323(a); cf. *Commodity Futures Trading Comm'n* v. *Weintraub*, 471 U. S. 343 (1985), not "an arm of the Government," *Department of Employment* v. *United States*, 385 U. S. 355, 359–360 (1966), and the tax on the estate is an administrative expense of the debtor, not of the Federal Government, 11 U. S. C. § 503(b)(1)(B) (1982 ed. and Supp. V). Cf. *Missouri* v. *Gleick*, 135 F. 2d 134, 137 (CA8 1943).[5] For the purposes of absolute tax immunity under the intergovernmental tax immunity doctrine, there is no material distinction between those municipal and state withholding and property taxes on the bankruptcy trustee which we have upheld, see *Otte* v. *United States*, 419 U. S. 43, 52–54 (1974); *Swarts* v. *Hammer*, 194 U. S., at 444, and the tax on the liquidation sale presented here.[6]

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[4] Judge Hand added:

"What the trustee is really complaining of is, not that a burden has been imposed upon the exercise of his functions, but of his inability to sell to a purchaser who would be exempt from a tax and because of such an exemption would pay a higher price to him than would ordinarily be paid for the goods sold. It seems unreasonable to treat the absence of an exemption from taxes as a burden upon the normal exercise of a governmental function." 85 F. 2d, at 27.

The *Goggin* courts also based their proscription of state sales and use taxes on an implied prohibition that they found in 28 U. S. C. § 960.[7] The *Goggin II* court read § 960 as setting forth "the sole area where the state is permitted to impose a tax of any type" and reasoned that because Congress had not specifically granted the States authority to impose sales and use taxes on liquidation, "essential sales in liquidation [were] inevitably free from such imposition." 245 F. 2d, at 46. That view is contrary to our general approach to claims that the States' power to tax have been pre-empted and to the plain meaning and legislative history of this particular statutory provision.

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[5] Under 11 U. S. C. § 346(c)(2) (1982 ed., Supp. V), the trustee is required to "make any tax return otherwise required by State or local law to be filed by or on behalf of" a corporation or partnership in bankruptcy "in the same manner and form as such corporation or partnership, as the case may be, is required to make such return."

It follows, *a fortiori*, that when, as in this case, the debtor is permitted to remain in possession, the same duties may be imposed on the debtor-in-possession. See 11 U. S. C. § 1107(a) (1982 ed., Supp. V) (debtor-in-possession shall perform all the functions and duties of trustee).

[6] The commentators are in agreement. See Wurzel, Taxation During Bankruptcy Liquidation, 55 Harv. L. Rev. 1141, 1166–1169 (1942) (footnote omitted) ("[T]here is no implied immunity of a federal instrumentality from a state tax that is general and nondiscriminatory if its effects upon the Federal Government are merely 'incidental.' A general and nondiscriminatory tax on a trustee fulfills this requirement. . . . The tax does not place a financial burden upon the United States; nor will it—unless it is discriminatory and therefore unconstitutional—render the trustee's task more difficult or cumbersome"); Note, State Taxation of Bankruptcy Liquidations: Federalism Misconceived, 67 Yale L. J. 335, 340 (1957) (footnotes omitted) ("Case law suggests that a sales or use tax should be upheld even in the absence of an applicable federal waiver. The immunity of one sovereign from taxation by another originated in the belief that the taxing power is necessarily destructive. This rationale has been repudiated, and *Graves* [v. *New York ex rel. O'Keefe*, 306 U. S. 466 (1939),] indicates that only taxes which can be so manipulated should be invalidated. Absent discriminatory application against sellers and buyers at liquidation sales, a sales or use tax should not seriously impede the federal bankruptcy process").

Although Congress can confer an immunity from state taxation, see *Washington* v. *United States*, 460 U. S. 536, 540 (1983); *First Agricultural Nat. Bank* v. *State Tax Comm'n*, 392 U. S. 339 (1968); *United States* v. *City of Detroit*, 355 U. S. 466, 474 (1958), we have stated that "[a] court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed," *Rockford Life Ins. Co.* v. *Illinois Dept. of Revenue*, 482 U. S. 182, 191 (1987). See also *Oklahoma Tax Comm'n* v. *United States*, 319 U. S. 598, 607 (1943); *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 479 (1939). Section 960 is not such a clear expression of an exemption from state taxation. It was passed in 1934, at the height of the intergovernmental tax immunity doctrine, in response to a Federal District Court decision holding that a bankruptcy receiver operating a gasoline and oil distributing business was not liable as a matter of state law for a state sales tax on motor fuel. See H. R. Rep. No. 1138, 73d Cong., 2d Sess. (1934); S. Rep. No. 1372, 73d Cong., 2d Sess. (1934).[8] Read most naturally, the statute evinces an intention that a State be permitted to tax a bankruptcy estate notwithstanding any intergovernmental immunity objection that might be interposed, cf. *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 813 (1989), and that, as a matter of federal law, "a business in receivership, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating the enterprise," *Palmer* v. *Webster and Atlas Nat. Bank of Boston*, 312 U. S. 156, 163 (1941).[9] The statute "indicates a Congressional purpose to facilitate—not to obstruct—enforcement of state laws." *Boteler* v. *Ingels,* 308 U. S. 57, 60–61 (1939). Nothing in the plain language of the statute, its legislative history, or the structure of the Bankruptcy Code indicates that Congress intended to exclude taxes on the liquidation process from those taxes the States may impose on the bankruptcy estate.

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[7] Title 28 U. S. C. § 960 provides:

"Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

The original provision, as passed by Congress in 1934, provided:

"That any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after the enactment of this Act, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: *Provided, however,* That nothing in this Act contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to the approval of this Act, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same." Act of June 18, 1934, ch. 585, 48 Stat. 993.

The changes in language were made in 1948 as part of the general revision of the Judicial Code and impart no significant change in meaning. See *Finley* v. *United States*, *ante*, at 554.

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[8] See also 78 Cong. Rec. 6656 (1934) (statement of Rep. McKeown) ("A great many receivers in oil cases have been held by the court not liable to pay taxes. They do not pay the gasoline taxes to the State. There are thousands of dollars being lost to the State, because these receivers in gasoline and oil cases are not liable to pay those taxes. In the receivers for bank cases they do not have to pay the taxes to the State"). Ironically, the District Court decision in *Howe* v. *Atlantic, Pacific & Gulf Oil Co.*, 4 F. Supp. 162 (WD Mo. 1933), that precipitated passage of the Act was reversed on state-law grounds even before the Act was signed into law. See *Kansas City* v. *Johnson*, 70 F. 2d 360 (CA8), cert. denied, 293 U. S. 617 (1934).

[9] "If the terms of the Louisiana statute had specifically provided for the levy of a tax against the trustee or receiver, there could be no doubt that the trustee would be liable for the franchise tax. There were controversies between state taxing authorities and the various liquidating agencies

Eighty-five years ago, in *Swarts* v. *Hammer,* 194 U. S. 441 (1904), we held that property in the hands of a bankruptcy trustee was subject to taxation by state and municipal authorities. The appellant in that case argued, in much the same manner as respondent does here, that the transfer of assets to a bankruptcy trustee vested the Federal Government with exclusive control of the bankruptcy estate and that "no other sovereignty, be it State or foreign, is permitted to exercise any power that burdens or in any manner interferes with the distribution prescribed by the act." Statement, Specification of Error and Argument for Appellant in *Swarts* v. *Hammer,* O. T. 1902, No. 238, p. 4. We responded that "[b]y the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property," and that "there is nothing in that to withdraw it from the necessity of protection by the State and municipality, or which should ex-

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appointed by the Federal courts as to the liability for such taxes. Congress has, in the interest of justice or good will, by this Act directed the trustee to pay rather than litigate these tax claims. By the sweeping terms of this statute all doubts have been resolved in favor of the state taxes." *Thompson* v. *State of Louisiana,* 98 F. 2d 108, 111 (CA8 1938). See also 3A Collier on Bankruptcy § 62.14, p. 1526 (14th ed. 1975) ("The true meaning of the Act of June 18, 1934, would seem to be a declaration of policy: if States decide not to exempt from tax a business conducted by the officer of a federal bankruptcy court, such tax should be paid and bankruptcy, though governed by federal law, should not be raised as a defense, allowing bankrupt businesses to compete at an advantage with non-bankrupt businesses"); Pepper, Application of State Franchise Taxes to Trustees in Bankruptcy, 14 Taxes 259 (1936) ("All that Congress said in its enactment is that if a state imposes a tax upon a trustee, he cannot claim exemption by reason of the fact that he is a trustee").

empt it from its obligations to either." 194 U. S., at 444. If Congress wished to declare otherwise, its intent would have to "be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." *Ibid.* The law that has intervened in the last 85 years, rejecting any distinction between a tax on property and a tax on operations, only gives force to our conclusion that the intergovernmental tax immunity doctrine does not proscribe the tax sought to be assessed here.

We therefore vacate the judgment of the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The Court today, overturning a 32-year-old Court of Appeals decision, settles a Circuit conflict of ancient vintage and doubtful urgency in a case where the question decided is not properly presented. Although the majority may well be correct that *California State Board of Equalization* v. *Goggin*, 245 F. 2d 44 (CA9) *(Goggin II)*, cert. denied, 353 U. S. 961 (1957), is not good law, I respectfully dissent from the majority's resolution of an issue that is res judicata in this litigation.

The history of this case, notably missing from the majority opinion, has its genesis in 1980, when China Peak Resort, Ltd., filed for Chapter 11 bankruptcy relief. After a variety of proceedings, the receiver, Robert T. Ford, entered into negotiations with Snow Summit Ski Corporation and respondent Sierra Summit, Inc., its wholly owned subsidiary, for the sale of China Peak's assets. See *In re China Peak Resort*, 847 F. 2d 570, 571 (CA9 1988). The sale was consummated with the approval of the Bankruptcy Court, and China Peak dismissed its bankruptcy petition. After the sale, petitioner Board attempted to assess the debtor's principals and Mr. Ford for taxes on the sale of China Peak's assets to Snow Summit. The bankruptcy trustee moved to reopen the bankruptcy case and filed an adversary proceeding on his own behalf and on behalf of the debtor, seeking to bar the tax assessment. After full briefing, the Bankruptcy Court found that the sale amounted to a liquidation of the China Peak estate and that, therefore, a tax on the sale was prohibited by *Goggin II*. *In re China Peak*, Advisory Proceeding No. 183–0344 (Bkrtcy. Ct. ED Cal. 1983), App. to Pet. for Cert. A–27. The Bankruptcy Court's judgment prohibited the Board from assessing or enforcing any tax against the trustee, China Peak, its principals, or other parties "by reason of the sale of the assets of China Peak Resort, Ltd. to Snow Summit." *Id.*, at A–28. *Petitioner did not appeal this 1983 judgment*, and it became final when the time for appeal expired later that year.

The instant case arose when petitioner attempted to assess a use tax against Sierra Summit for revenues collected from the rental of ski equipment obtained in the China Peak sale. Sierra Summit claimed that the 1983 order precluded the assessment of these taxes and sought enforcement of the injunction. The Court of Appeals ultimately granted Sierra Summit relief, remanding the case to the Bankruptcy Court with instructions to issue a contempt citation against petitioner. 847 F. 2d, at 572–573.

Petitioner now argues to this Court, and the majority agrees, that *Goggin II*—the legal basis for the order from which the contempt arises—was wrongly decided. In my view, petitioner's challenge to the wisdom of *Goggin II* comes far too late. Petitioner had ample opportunity to challenge the continuing validity of *Goggin II* in the litigation resulting in the 1983 order, but failed to appeal the adverse judgment. That final judgment, and the legal precedents underlying it, are not now subject to collateral attack in these contempt proceedings. This Court in *Federated Department Stores, Inc.* v. *Moitie*, 452 U. S. 394 (1981), wrote:

> "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. . . . Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Id.*, at 398.

In *Maggio* v. *Zeitz*, 333 U. S. 56 (1948), the Court applied these principles in a situation strikingly similar to the case at hand. There, in an appeal from a contempt order, the losing party attempted to challenge the merits of the judgment that he violated. The Court refused to hear the challenge because, "when completed and terminated in a final order, [the decision] becomes *res judicata* and not subject to collateral attack in the contempt proceedings." *Id.*, at 68. The Court elaborated:

> "It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. . . . [W]hen [an order] has become final, disobedience cannot be justified by re-trying the issues as to whether the order should have been issued in the first place." *Id.*, at 69.

None of the cases cited by the majority as authorizing its race to the merits persuades me to set aside these time-honored principles of appellate review. See *ante*, at 846–847, n. 3. Neither *Canton* v. *Harris*, 489 U. S. 378 (1989), nor *Oklahoma City* v. *Tuttle*, 471 U. S. 808 (1985), concerned the doctrine of res judicata. *Donovan* v. *City of Dallas*, 377 U. S. 408 (1964), did involve review both of a contempt citation and of the order underlying the contempt. In contrast to this case, however, the Court in *Donovan* did not reach the merits of a final underlying order as part of its review of a contempt citation. Rather, the Court simultaneously granted Donovan's petition for certiorari seeking review of the underlying State Supreme Court injunction *and* his separate petition seeking review of the subsequent contempt conviction. *Id.*, at 411. Far from revisiting the merits of an unappealed judgment, the Court in *Donovan* reviewed the underlying judgment itself in the ordinary course of business.

Accordingly, in my view, the only issue properly before the Court is the application of the 1983 order to the facts underlying the issuance of the contempt citation. Although of obvious importance to the parties, this wholly case-specific inquiry does not merit this Court's attention, and I would dismiss the writ of certiorari as having been improvidently granted.

GOMEZ *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 88–5014. Argued April 24, 1989—Decided June 12, 1989*

A Magistrate assigned by the District Judge conducted the *voir dire* examination and jury selection for petitioners' trial on multiple felony counts. The judge overruled petitioners' objections to the assignment of the Magistrate. The judge offered to review any of the Magistrate's rulings *de novo*, but petitioners registered no specific challenge to the selection of any juror. After petitioners were convicted and sentenced, they contended on appeal that the Magistrate had no power to conduct the *voir dire* examination and jury selection, but made no specific claim of prejudice. The Court of Appeals affirmed their convictions, noting that the Federal Magistrates Act permits district courts to assign magistrates certain described powers and duties, as well as "such additional duties as are not inconsistent with the Constitution and laws of the United States." The court held that Congress intended this additional duties clause to be construed broadly enough to include jury selection by magistrates, adding that such a designation does not violate Article III or the Due Process Clause.

Held:

1. Presiding at the selection of a jury in a felony trial without the defendant's consent is not one of the "additional duties" that the Act permits courts to assign to magistrates. Pp. 863–876.

(a) Read literally and without reference to its statutory context, the additional duties clause encompasses any assignment that is not explicitly prohibited by statute or by the Constitution. It is the Court's settled policy, however, to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question. Thus it is appropriate to examine the Act's overall structure and purpose to determine whether any "additional duties" assigned to a magistrate bear some reasonable relation to the other duties that, because they are specifically enumerated in the Act, define the attributes of the magistrate's office. See, *e. g.*, *Mathews* v. *Weber*, 423 U. S. 261. Pp. 863–865.

(b) The Act's structure and legislative history demonstrate a congressional intent to limit a magistrate's range of duties in criminal cases

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*Together with No. 88–5158, *Chavez-Tesina* v. *United States*, also on certiorari to the same court.

to: performing certain pretrial and post-trial functions, subject to one of two levels of judicial review depending on the scope and significance of the magistrate's decision; and conducting bench and jury trials on misdemeanor charges, but only upon special assignment by, and subject to the review of, the district court, and only with the consent of the parties. Pp. 865–871.

(c) The absence of a specific reference in the Act or its legislative history to jury selection in felony trials demonstrates that Congress did not intend the additional duties clause to embrace this function. *Voir dire* in a felony case is a critical stage of the trial. However, the Act's carefully defined grant of authority to magistrates to conduct trials of minor criminal cases must be construed as an explicit withholding of the authority to preside at felony trials. Even assuming that Congress did not consider *voir dire* to be part of the trial, it is unlikely that it intended to allow a magistrate to conduct jury selection as an "additional duty" not subject to the procedural guidance or judicial review applicable to pretrial matters. In any event, it is doubtful that a district judge could review the jury selection function meaningfully, since no transcript can recapture the atmosphere of the *voir dire*. Pp. 871–876.

2. There is no merit to the Government's argument that any error was harmless because petitioners allege no specific prejudice as a result of the Magistrate's conducting the *voir dire*. Harmless-error analysis does not apply in a felony case in which, despite the defendant's objection and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury. P. 876.

848 F. 2d 1324, reversed.

STEVENS, J., delivered the opinion for a unanimous Court.

Joel B. Rudin argued the cause for petitioners in both cases. With him on the briefs was *Jerald Levine*.

Michael K. Kellogg argued the cause for the United States. On the brief were *Acting Solicitor General Bryson*, *Assistant Attorney General Dennis*, and *Richard J. Lazarus*.†

JUSTICE STEVENS delivered the opinion of the Court.

Since its enactment in 1968, the Federal Magistrates Act has permitted district courts to assign magistrates certain described powers and duties, as well as "such additional duties as are not inconsistent with the Constitution and laws of the United States."[1] The principal question presented is whether presiding at the selection of a jury in a felony trial without the defendant's consent is among those "additional duties."

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†*Burton H. Shostak* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

I

Petitioners Jose Gomez and Diego Chavez-Tesina were among 11 persons named as defendants in a 21-count indictment alleging commission of multiple felonies, including conspiracy and racketeering, involving distribution of cocaine.[2] Having elected to stand trial, petitioners and three codefendants appeared before the Federal Magistrate to whom the District Judge had delegated the task of selecting a jury.[3] Defense counsel made timely objections to this assignment. Following a telephone conversation with the District Judge, the Magistrate noted their objections and commenced *voir dire*. App. 13–16. As is the practice in the Eastern District of New York, the Magistrate, rather than the attorneys, posed questions to the venirepersons.[4] The Magistrate also introduced the prospective jurors to the offenses charged; instructed them on numerous points of law, including the presumption of innocence and the different burdens of persuasion in civil and criminal trials; and admonished chosen jurors not to discuss the case with anyone. See generally Tr. of Jury Selection. When defense counsel appeared before the

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[1] Pub. L. 90–578, 82 Stat. 1108, as amended, 28 U. S. C. § 636(b)(3).

[2] Both petitioners were charged with conspiracy to distribute, and actual distribution of, cocaine, in violation of 21 U. S. C. §§ 841, 846 (1982 ed. and Supp. V). In addition, petitioner Chavez-Tesina was charged with violating the Racketeer Influenced and Corrupt Organizations Act, 18 U. S. C. § 1962(c), and the Travel Act, 18 U. S. C. § 1952 (1982 ed. and Supp. V). *United States* v. *Garcia*, 848 F. 2d 1324, 1327 (CA2 1988).

[3] Cited as authority for the assignment was a local rule that states: "Full-time magistrates shall have jurisdiction to discharge the duties set forth in 28 U. S. C. Sec 636." Fed. Local Ct. Rule 1 (EDNY 1988); see *Garcia*, 848 F. 2d, at 1327.

[4] *Id.*, at 1338 (Oakes, J., dissenting). Cf. Fed. Rule Crim. Proc. 24(a).

District Judge eight days later, they renewed their objections to the Magistrate's role in jury selection. The District Judge overruled the objections but said he would review any of the Magistrate's rulings *de novo*. App. 19. Defendants registered no specific challenge to any juror, and trial proceeded; 10 days later, the jury returned guilty verdicts against all five defendants. Gomez received two concurrent 10-year sentences, to be followed by a special 10-year parole term; Chavez-Tesina was ordered to serve 20 years on one count, with three lesser sentences to run concurrently, and lifetime special parole.

On appeal, defendants made no special claim of prejudice. They contended, as petitioners do before this Court, that the Magistrate had no power to conduct the *voir dire* examination and jury selection. A divided panel of the Court of Appeals rejected this argument. *United States* v. *Garcia*, 848 F. 2d 1324 (CA2 1988). The court held that Congress intended the additional duties clause to be construed broadly enough to include jury selection by magistrates. *Id.*, at 1329. Such a designation, the majority added, does not violate Article III or the Due Process Clause of the Federal Constitution. *Id.*, at 1330–1333. The dissenting judge expressed doubts concerning both the majority's statutory interpretation and its constitutional analysis, and concluded that the court should exercise its supervisory powers to forbid delegation of *voir dire* to magistrates "except, possibly, when the parties consent, and then only pursuant to rules controlling the district court's review."[5]

The Second Circuit's decision conflicts with the holding of the Fifth Circuit in *United States* v. *Ford*, 824 F. 2d 1430, 1438 (1987) (en banc), cert. denied, 484 U. S. 1034 (1988). The Government had urged the court to construe the additional duties clause of the Federal Magistrates Act to allow judges to delegate jury selection in felony trials even without the defendant's consent. That construction would provoke "grave constitutional questions," the en banc majority stated. 824 F. 2d, at 1430; see *id.*, at 1435. After stressing the importance of jury selection and noting the specificity with which Congress defined magistrates' duties regarding other judicial proceedings, the majority concluded:

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[5] 848 F. 2d, at 1338 (Oakes, J.). Cf. *United States* v. *Ford*, 824 F. 2d 1430, 1440 (CA5 1987) (en banc) (Jolly, J., concurring in result) ("[I]t might be appropriate and wise for federal courts, in their supervisory capacity, to enact rules curtailing, or even precluding the use of magistrates at voir dire in certain situations"), cert. denied, 484 U. S. 1034 (1988).

> "Additional duty is a residuum, granting the power to delegate any task not otherwise forbidden after we carve away that congery of duties that Congress never envisioned would be delegated. We are not persuaded that Congress intended to grant authority to judges to delegate to magistrates the authority to preside over felony trials and over activities integral to and intimately tied with trial."[6]

We granted certiorari to resolve this important conflict. 488 U. S. 838 (1989).[7]

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[6] 824 F. 2d, at 1438. Nonetheless, because the defendant failed to object and "the trial was fundamentally fair," the court held that the Magistrate's participation was harmless error and affirmed the conviction. *Id.*, at 1439; accord, *ibid.* (Jolly, J., concurring in result). In dissent, four judges maintained that the delegation fell within the express scope of the statute and withstood constitutional scrutiny. *Id.*, at 1440–1448 (Rubin, J.).

[7] The Eighth Circuit has followed the Fifth Circuit in *Ford*, while two Ninth Circuit opinions decide the issue much as the Second Circuit did below. Compare *United States* v. *Trice*, 864 F. 2d 1421 (CA8 1988), with *United States* v. *Peacock*, 761 F. 2d 1313 (CA9), cert. denied, 474 U. S. 847 (1985); *United States* v. *Bezold*, 760 F. 2d 999 (CA9 1985), cert. denied, 474 U. S. 1063 (1986). See also *United States* v. *Rodriguez-Suarez*, 856 F. 2d 135 (CA11 1988) (because no assertion of prejudice, declines to reach merits of claim), cert. denied, 488 U. S. 1045 (1989). In other opinions Courts of Appeals have rejected challenges to a magistrate's presiding over jury selection on procedural grounds. *United States* v. *Rivera-Sola*, 713 F. 2d 866 (CA1 1983) (defendant failed to object, no plain error); *United States* v. *DeFiore*, 720 F. 2d 757 (CA2 1983) (failure to object), cert. denied *sub nom. Coppola* v. *United States*, 466 U. S. 906 (1984).

II

The Federal Magistrates Act provides that a "magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U. S. C. § 636(b)(3). Read literally and without reference to the context in which they appear, these words might encompass any assignment that is not explicitly prohibited by statute or by the Constitution. The Act itself specifies some proscriptions: magistrates "may hold no other civil or military office or employment under the United States," § 631(c), nor "engage in the practice of law [or] any other business, occupation, or employment inconsistent with the expeditious, proper, and impartial performance of their duties as judicial officers," § 632(a). The only legal constraint on many other assignments not expressly barred—whether supervising repair of the courthouse electrical system or presiding at felony trials—must be found, according to the literal reading, in the Constitution. The panel majority below and the dissenters in *Ford* embraced this construction,[8] despite abiding concerns regarding the constitutionality of delegating felony trial duties to magistrates.[9]

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[8] *Garcia,* 848 F. 2d, at 1329 (quoting *In re Establishment Inspection of Gilbert & Bennett Manufacturing Co.*, 589 F. 2d 1335, 1340–1341 (CA7) (in sustaining inspection warrant issued by Magistrate, states that the "'only limitations on section 636(b)(3) are that the duties be consistent with the Constitution and federal laws and that they not be specifically excluded by section 636(b)(1)'"), cert. denied *sub nom. Chromalloy American Corp., Federal Malleable Div.* v. *Marshall,* 444 U. S. 884 (1979)); *Ford,* 824 F. 2d, at 1441 (Rubin, J.).

[9] See, *e. g.*, Hearings on S. 3475 et al. before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee, 89th Cong., 2d Sess., and 90th Cong., 1st Sess., p. 109 (1966–1967) (statement of Assistant Attorney General Vinson) (magistrates' jurisdiction to try minor criminal offenses unconstitutional even with defendant's waiver of rights); H. R. Rep. No. 1629, 90th Cong., 2d Sess., p. 21 (1968) (disagreeing with Vinson); 114 Cong. Rec. 27338–27343 (1968). See also *Ford,* 824 F. 2d, at 1437; H. R. Rep. No. 96–287, pp. 32–33 (1979) (dissenting views of Rep. Sensenbrenner).

It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question. See, *e. g.*, *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 841 (1986); *United States* v. *Rumely*, 345 U. S. 41, 45 (1953); *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). In these cases, such an alternative interpretation of the additional duties clause readily may be deduced from the context of the overall statutory scheme. Cf. *Massachusetts* v. *Morash*, *ante*, at 115 ("'[I]n expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy'") (quoting *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U. S. 41, 51 (1987); *Richards* v. *United States*, 369 U. S. 1, 11 (1962)). When a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties. Thus in *United States* v. *Raddatz*, 447 U. S. 667, 674–676 (1980); *Mathews* v. *Weber*, 423 U. S. 261 (1976); and *Wingo* v. *Wedding*, 418 U. S. 461 (1974), we interpreted the Federal Magistrates Act in light of its structure and purpose.

In *Mathews*, we considered whether preliminary review, argument, and preparation of recommended decisions in Social Security benefits cases were among the "additional duties" that a magistrate could perform. The Government opposed such referrals, arguing that Congress intended a magistrate to be a "'supernotary,'" assuming only the district judge's "irksome, ministerial tasks,"[10] while the benefits

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[10] The Government had argued:

"In the Magistrates Act, Congress gave magistrates only a limited role in the operation of the federal judicial system. District courts were not authorized to delegate to the magistrates all judicial functions that they deemed appropriate. Rather, the role of the magistrates was to assist, and lighten the workload of, district judges by performing relatively minor claimant likened the magistrate to a "'para-judge'" with "a wide range of substantive judicial duties and advisory functions." 423 U. S., at 268. Declining to choose either extreme or to read the "additional duties" language literally, we examined the Act's structure and determined that limited, advisory review, subject to the district judge's ongoing supervision and final decision, fell among the "range of duties" that Congress intended magistrates to perform. *Id.*, at 270. In accordance with our reasoning in *Mathews*, our task is to consider the office of magistrate as it pertains to seating a jury in a felony case.

III

Before 1968, minor federal legal disputes were settled by United States commissioners, who collected fees for their services and often were not lawyers. Limitations on their jurisdiction resulted in the downgrading or dismissal of criminal offenses that otherwise would have to be tried by district judges. H. R. Rep. No. 1629, 90th Cong., 2d Sess., p. 14 (1968). The new office of magistrate, in contrast, was to be filled in most instances by attorneys. 82 Stat. 1108, 28 U. S. C. §631(b) (1964 ed., Supp. IV). Paid by salary, magistrates were to be appointed by district judges to definite terms from which they could be removed only for cause. 82 Stat. 1109, 28 U. S. C. §§631(e), (h).

With enhanced status came greater responsibility. The Act not only conferred upon magistrates all the powers that commissioners had enjoyed, §636(a), but also permitted district courts to establish rules by which magistrates could be assigned

> "such additional duties as are not inconsistent with the Constitution and laws of the United States. The addi-

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functions. The statutory phrase authorizing the district courts to assign to magistrates 'duties . . . not inconsistent with the Constitution and laws of the United States' must be read narrowly to reflect the limitations imposed upon the magistrates." Brief for Petitioner in *Mathews* v. *Weber*, O. T. 1975, No. 74–850, p. 8.

> tional duties authorized by rule may include, but are not restricted to—
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> "(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;
>
> "(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and
>
> "(3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing." § 636(b).

Commissioners had tried only "petty offenses."[11] Magistrates were empowered to try "minor offenses,"[12] but only upon special designation by the district court and only if the defendant, in writing, specifically waived his or her rights to trial before a judge and perhaps by a jury. 82 Stat. 1116, 18 U. S. C. § 3401(b) (1964 ed., Supp. IV). A convicted defendant could appeal to the district court, § 3402, and Congress contemplated that district courts would retain "the greatest possible scrutiny and control of a magistrate's trial jurisdiction," H. R. Rep. No. 1629, at 21.[13] Exempted from that jurisdiction were a number of minor offenses—such as bribery and public corruption, deprivation of rights under color of law, and jury tampering, 82 Stat. 1116, 18 U. S. C. § 3401(f) (1964 ed., Supp. IV)—that required the exercise of delicate judgment and "as a matter of sound congressional policy, ought to be tried in the U. S. district courts." H. R. Rep. No. 1629, at 22.

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[11] "Petty offenses" included "[a]ny misdemeanor, the penalty for which . . . does not exceed imprisonment for a period of six months or a fine of not more than $500, or both," 18 U. S. C. § 1(3) (1964 ed.), repealed by Pub. L. 98–473, § 218(a)(1), 98 Stat. 2027.

[12] "'[M]inor offenses' means misdemeanors punishable under the laws of the United States, the penalty for which does not exceed imprisonment for a period of one year, or a fine of not more than $1,000, or both," 82 Stat. 1116, 18 U. S. C. § 3401(f) (1964 ed., Supp. IV).

[13] "The district judges may, for instance, exercise a veto power over the magistrate's jurisdiction in particular cases, require reports on cases pending before the magistrate, establish uniform procedures to be followed by

In 1976, Congress amended the Act "to clarify and further define the additional duties which may be assigned to a United States Magistrate,"[14] H. R. Rep. No. 94–1609, p. 2 (1976).[15] Upon consent of the parties, a magistrate could be

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all magistrates exercising minor offense trial jurisdiction, and generally supervise the magistrate in the exercise of his trial jurisdiction." H. R. Rep. No. 1629, at 21.

[14] In part, Congress intended to overturn judicial opinions limiting the scope of the Act, including *Wingo* v. *Wedding*, 418 U. S. 461 (1974) (magistrates not authorized to conduct evidentiary hearings in federal habeas corpus actions). H. R. Rep. No. 94–1609, p. 5 (1976); S. Rep. No. 94–625, pp. 3–4 (1976). Our holding in *Mathews* v. *Weber*, 423 U. S. 261 (1976) (Act authorizes magistrates to review and recommend disposition on Social Security benefits appeals), meanwhile, garnered approval. H. R. Rep. No. 94–1609, at 6.

[15] The relevant part of the 1976 Act, which has not been amended, reads as follows:

"An Act

"To improve judicial machinery by further defining the jurisdiction of United States magistrates, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 636(b) of title 28, United States Code, is amended to read as follows:

. . . . .

"(b)(1) Notwithstanding any provision of law to the contrary—

"(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any designated a special master in any civil case. 90 Stat. 2729, 28 U. S. C. § 636(b)(2) (1976 ed.). A magistrate also could be assigned to "hear and determine any pretrial matter,"[16] subject to reconsideration by the district court on a showing that "the magistrate's order is clearly erroneous or contrary to law." § 636(b)(1)(A). Excepted were eight categories of "dispositive" pretrial motions; with regard to these a magistrate might conduct evidentiary and other hearings and rec-

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pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

"(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

"(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

"Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

"(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

"(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 90 Stat. 2729, 28 U. S. C. § 636.

[16] A table in a Committee Report listed the following as criminal pretrial matters handled by magistrates: arrest warrants, search warrants, bail hearings, preliminary examinations, removal hearings, postindictment arraignments, pretrial conferences, and pretrial motions. H. R. Rep. No. 94-1609, at 7; see *id.*, at 9.

ommend dispositions. § 636(b)(1)(B). If a party objected to the magistrate's recommendation, the judge was to "make a de novo determination" of the matter. § 636(b)(1)(C). The 1968 Act had listed such functions among a magistrate's additional duties; the 1976 amendments, in contrast, first described specific duties and then stated in a separate subsection that a "magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." § 636(b)(3). A Committee Report explained:

> "Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of 'pretrial matters.' This subsection would permit, for example, a magistrate to review default judgments, order the exoneration or forfeiture of bonds in criminal cases, and accept returns of jury verdicts where the trial judge is unavailable. This subsection would also enable the court to delegate some of the more administrative functions to a magistrate, such as the appointment of attorneys in criminal cases and assistance in the preparation of plans to achieve prompt disposition of cases in the court.
>
> "If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties." H. R. Rep. No. 94–1609, at 12.

By 1979, congressional concerns regarding magistrates' abilities had decreased; a legislative Committee reported that "the magistrate system now plays an integral and important role in the Federal judicial system."[17] H. R. Rep. No. 96–287, p. 5 (1979). Accordingly, in the Federal Magistrates

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[17] Accord, S. Rep. No. 96–74, pp. 3, 6 (1979). But see H. R. Rep. No. 96–287, at 31–33 (dissenting views of Rep. Holtzman and Rep. Sensenbrenner).

Act of 1979, Pub. L. 96–82, 93 Stat. 643–647, Congress enlarged the magistrate's jurisdiction over civil and criminal trials, codifying some of the experiments conducted under the Act's additional duties clause. See H. R. Rep. No. 96–287, at 2, 17. Thus since 1979 magistrates have been authorized to preside at, and enter final judgment in, civil trials, including those tried before a jury. 93 Stat. 643–644, 28 U. S. C. § 636(c). For the first time magistrates were permitted to conduct jury, as well as bench, trials on any misdemeanor charge.[18] 93 Stat. 646, 18 U. S. C. § 3401(b). As before, however, a magistrate's trial jurisdiction can be exercised only upon special designation by the district court, 93 Stat. 643, 28 U. S. C. § 636(c)(1); 93 Stat. 645, 18 U. S. C. § 3401(a), and it remains subject to judicial review.[19]

A critical limitation on this expanded jurisdiction is consent. As amended in 1979, the Act states that "neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate." 93 Stat. 643, 28 U. S. C. § 636(c)(2). In criminal cases, the Government may petition for trial before a district judge.[20] "Defendants charged with misdemeanors

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[18] "A misdemeanor is any offense for which the maximum term of imprisonment that may be imposed does not exceed one year. An unlimited fine may also be imposed." *Id.*, at 17. Accord, 18 U. S. C. § 3559(a) (1982 ed., Supp. V).

[19] Losing civil litigants are entitled to appeal to the district court or directly to the court of appeals and to seek discretionary review before this Court. 93 Stat. 643–644, 28 U. S. C. §§ 636(c)(3)–(6). Convicted defendants may take an appeal as of right to the district court. 18 U. S. C. § 3402.

[20] Whereas the 1968 Act had excluded certain minor offenses from the magistrate's jurisdiction, the 1979 amendments relaxed this requirement, providing:

"The district court may order that proceedings in any misdemeanor case be conducted before a district judge rather than a United States magistrate upon the court's own motion or, for good cause shown, upon petition by the attorney for the Government. Such petition should note the novelty, importance, or complexity of the case, or other pertinent factors, and can refuse to consent to a magistrate and thus effect the same removal," S. Rep. No. 96–74, p. 7 (1979), for the magistrate's criminal trial jurisdiction depends on the defendant's specific, written consent.[21]

IV

Through gradual congressional enlargement of magistrates' jurisdiction, the Federal Magistrates Act now expressly authorizes magistrates to preside at jury trials of all civil disputes and criminal misdemeanors, subject to special assignment, consent of the parties, and judicial review. The Act further details magistrates' functions regarding pretrial and post-trial matters, specifying two levels of review depending on the scope and significance of the magistrate's decision. The district court retains the power to assign to magistrates unspecified "additional duties," subject only to conditions or review that the court may choose to impose. By a literal reading this additional duties clause would permit magis-

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be filed in accordance with regulations promulgated by the Attorney General." 93 Stat. 646, 18 U. S. C. § 3401(f).

United States Department of Justice regulations require that in cases involving many of the offenses excluded in the 1968 Act, the "attorney for the government shall consult with the Assistant Attorney General having supervisory authority over the subject matter in determining whether to petition for trial before a district judge." 28 CFR § 52.02(b)(2) (1988).

[21] As amended, the statute states:

"Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court." 93 Stat. 646, 18 U. S. C. § 3401(b).

Cf. H. R. Rep. No. 96–287, at 20 ("Because of the consent requirement, magistrates will be used only as the bench, bar, and litigants desire, only in cases where they are felt by all participants to be competent").

trates to conduct felony trials. But the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial.[22] The legislative history, with its repeated statements that magistrates should handle subsidiary matters to enable district judges to concentrate on trying cases,[23] and its assurances that magistrates' adjudicatory jurisdiction had been circumscribed in the interests of policy as well as constitutional constraints,[24] confirms this inference. Similar considerations lead us to conclude that Congress also did not contemplate inclusion of jury selection in felony trials among a magistrate's additional duties.[25]

Even though it is true that a criminal trial does not commence for purposes of the Double Jeopardy Clause until the jury is empaneled and sworn, *Serfass* v. *United States*, 420

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[22] The Government concedes this point. See Tr. of Oral Arg. 30–31, 37; Brief for United States 14.

[23] See, *e. g.*, n. 16, *supra;* H. R. Rep. No. 94–1609, at 7 (magistrate is to "assist the district judge in a variety of pretrial and preliminary matters thereby facilitating the ultimate and final exercise of the adjudicatory function at the trial of the case"); S. Rep. No. 92–1065, p. 3 (1972) (magistrates "render valuable assistance to the judges of the district courts, thereby freeing the time of those judges for the actual trial of cases"); H. R. Rep. No. 1629, at 12 (purpose of 1968 Act is "to cull from the ever-growing workload of the U. S. district courts matters that are more desirably performed by a lower tier of judicial officers").

[24] See 114 Cong. Rec. 27342 (1968) (remarks of Rep. Poff) ("The intricate safeguards, the constitutional warnings, the statutory explanations, the written waivers and written elections required before the magistrate may exercise his trial jurisdiction in the individual case—all show a statutory intent to preserve trial before the district judge as the principal—rather than an elective or alternative—mode of proceeding in minor offense cases"); *id.*, at 27338–27343; H. R. Rep. No. 1629, at 21–22.

[25] Because we decide that the Federal Magistrates Act does not allow the delegation of jury selection to magistrates, we need not consider the second question presented in these cases; *i. e.*, whether such a delegation would be constitutional. Cf. *Mathews*, 423 U. S., at 269, n. 5; *Wingo*, 418 U. S., at 467, n. 4.

U. S. 377, 388 (1975), other constitutional rights attach before that point, see, *e. g.*, *Brewer* v. *Williams*, 430 U. S. 387, 398 (1977) (assistance of counsel). Thus in affirming *voir dire* as a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present, the Court wrote: " '[W]here the indictment is for a felony, the trial commences at least from the time when the work of empanelling the jury begins.' " *Lewis* v. *United States*, 146 U. S. 370, 374 (1892) (quoting *Hopt* v. *Utah*, 110 U. S. 574, 578 (1884)). See *Swain* v. *Alabama*, 380 U. S. 202, 219 (1965) (*voir dire* "a necessary part of trial by jury"); see also *Ricketts* v. *Adamson*, 483 U. S. 1, 3 (1987); *United States* v. *Powell*, 469 U. S. 57, 66 (1984). Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, *Rosales-Lopez* v. *United States*, 451 U. S. 182, 188 (1981); *Ham* v. *South Carolina*, 409 U. S. 524 (1973); *Dennis* v. *United States*, 339 U. S. 162 (1950), or predisposition about the defendant's culpability, *Irvin* v. *Dowd*, 366 U. S. 717 (1961). Indications that Congress likewise considers jury selection part of a felony trial may be gleaned, *inter alia*, from its passage in 1975 of the Speedy Trial Act, 18 U. S. C. §3161 *et seq.* (1982 ed. and Supp. V),[26] and its placement of rules pertaining to criminal petit juries in a chapter entitled "Trial." See Fed. Rules Crim. Proc. 23, 24; cf. *id.*, Rule 43(a) (requiring defendant's presence "at every stage of the trial including the impaneling of the jury").

Even assuming that Congress did not consider *voir dire* to be part of trial, it is unlikely that it intended to allow a magistrate to conduct jury selection without procedural guidance or judicial review. Significantly, when Congress clarified the magistrate's duties in 1976, it did not identify the selection of a jury as either a "dispositive" matter covered by

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[26] See *United States* v. *Howell*, 719 F. 2d 1258, 1262 (CA5 1983) (for Speedy Trial Act purposes, trial commences at *voir dire*), cert. denied, 467 U. S. 1228 (1984).

§ 636(b)(1)(B) or a "nondispositive" pretrial matter governed by § 636(b)(1)(A). To the limited extent that it fits into either category, we believe jury selection is more akin to those precisely defined, "dispositive" matters for which subparagraph (B) meticulously sets forth a *de novo* review procedure.[27] It is incongruous to assume that Congress implicitly required such review for jury selection yet failed even to mention that matter in the statute. It is equally incongruous to assume, in the alternative, that Congress intended not to require any review—not even the less stringent clearly-erroneous standard applicable to other pretrial matters[28]—of a magistrate's selection of a jury. Yet one of those assumptions would be a necessary component of a conclusion that Congress intended jury selection to be one of a magistrate's additional duties.

In any event, we harbor serious doubts that a district judge could review this function meaningfully. Far from an administrative empanelment process, *voir dire* represents jurors' first introduction to the substantive factual and legal issues in a case. To detect prejudices, the examiner—often, in the federal system, the court—must elicit from prospective jurors candid answers about intimate details of their lives. The court further must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality. See, *e. g., Wainwright* v. *Witt,* 469 U. S. 412, 428, n. 9 (1985) (quoting *Reynolds* v. *United States,* 98 U. S. 145, 156–157 (1879)). But only words can be preserved for review; no transcript can recapture the atmosphere of the *voir dire,* which may persist throughout the trial.[29] Cf. *Waller* v. *Georgia,* 467 U. S. 39, 49, n. 9 (1984) ("While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real"). The absence of a specific reference to jury selection in the statute, or indeed, in the legislative history,[30] persuades us that Congress did not intend the additional duties clause to embrace this function.

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[27] Like motions to suppress evidence, petitions for writs of habeas corpus, and other dispositive matters entailing evidentiary hearings, jury selection requires the adjudicator to observe witnesses, make credibility determinations, and weigh contradictory evidence. See *Wainwright* v. *Witt*, 469 U. S. 412 (1985). Clearly it is more difficult to review the correctness of a magistrate's decisions on these matters than on pretrial matters, such as discovery motions, decided solely by reference to documents.

[28] Having concluded, n. 27, *supra*, that jury selection is more like the dispositive matters governed by § 636(b)(1)(B), we agree with the Eighth Circuit that "[s]ubparagraph (A) was plainly intended for less important matters than voir dire," *Trice*, 864 F. 2d, at 1428, and deem meritless the Government's contention—advanced for the first time in this litigation before this Court—that jury selection is among the pretrial matters that a magistrate may "hear and determine," subject to review only for mistakes that are clearly erroneous or contrary to law. See Brief for United States 7–11, and n. 7; Tr. of Oral Arg. 37.

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[29] See Note, 102 Harv. L. Rev. 533, 538–539 (1988). Thus magistrates' participation in jury *voir dire* differs palpably from their preliminary review—which district judges easily may examine before making a final decision—of "closed administrative record[s]" in Social Security cases, a function clearly within the additional duties contemplated by Congress. See *Mathews,* 423 U. S., at 270–271.

In *United States* v. *Raddatz,* 447 U. S. 667, 680 (1980), we noted that a judge, if troubled by the credibility determinations a magistrate made during a suppression hearing, could rehear the witnesses. Although a judge similarly could question jurors further, as a practical matter a second interrogation might place jurors on the defensive, engendering prejudices irrelevant to the facts adduced at trial. See *Garcia,* 848 F. 2d, at 1337 (Oakes, J., dissenting). Even assuming that a district judge could review the magistrate's actions meaningfully by examining the transcript or reexamining jurors, the time consumed by such review would negate time initially saved by the delegation. See *Ford,* 824 F. 2d, at 1437.

[30] Although Committee Reports, for example, often include charts listing magistrates' duties, none mentions jury selection. See H. R. Rep. No. 96–287, at 4–5; S. Rep. No. 96–74, at 3; H. R. Rep. 94–1609, at 7; S. Rep. 94–625, at 5. The legislative history's lone reference to *voir dire* as a magistrate's duty appears to occur in a letter from the Chief Judge of the District of Oregon, to which a Committee Report referred favorably. H. R. Rep. No. 94–1609, at 9. The letter suggests that a magistrate selected

V

The Government concedes, as it must, that errors occurring during jury selection may be grounds for reversal of a conviction. Brief for United States 44, n. 41 (citing *Batson* v. *Kentucky*, 476 U. S. 79, 85 (1986); *Witherspoon* v. *Illinois*, 391 U. S. 510, 522 (1968)). Yet it argues that any error in these cases was harmless because petitioners allege no specific prejudice as a result of the Magistrate's conducting the *voir dire* examination. Brief for United States 42–45. We find no merit to this argument. Among those basic fair trial rights that "'can never be treated as harmless'" is a defendant's "right to an impartial adjudicator, be it judge or jury." *Gray* v. *Mississippi*, 481 U. S. 648, 668 (1987) (quoting *Chapman* v. *California*, 386 U. S. 18, 23 (1967)). Equally basic is a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside. Thus harmless-error analysis does not apply in a felony case in which, despite the defendant's objection and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury.

The judgment of the Court of Appeals is

Reversed.

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juries only with consent of the parties, perhaps only in civil trials. Furthermore, it displays little concern about the validity of such assignments:

"How can we do all of this? We just do it. It's not necessary that we find authority in black and white before we give something to the magistrate. . . . Sure we might get shot down once in a while by an appellate court. So what?" Hearing on S. 1283 before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee, 94th Cong., 1st Sess., pp. 39–40 (1975).

SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* HUDSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 88-616. Argued April 17, 1989—Decided June 12, 1989

After a final decision of the Secretary of Health and Human Services denied respondent's application for Social Security disability benefits, she brought an action for judicial review in the District Court under 42 U. S. C. § 405(g). The court affirmed the denial, but the Court of Appeals reversed on the ground that the Secretary had not followed her own regulations in making the disability determination, vacated the Secretary's decision, and instructed the District Court to remand the case to the Secretary for reconsideration. On remand, respondent was represented by counsel in proceedings before an Administrative Law Judge (ALJ). After the Social Security Appeals Council adopted the ALJ's recommended decision that respondent was disabled and instructed the Secretary to pay her benefits, the District Court granted the Secretary's motion to dismiss the judicial review action on the ground that respondent had obtained all the relief prayed for. The court retained jurisdiction over the action for the limited purpose of considering any petition for attorney's fees. Respondent then filed such a petition under the Equal Access to Justice Act (EAJA), 28 U. S. C. § 2412(d) (1982 ed., Supp. V), but the District Court denied the petition on the ground that the Secretary's position in the initial denial of benefits was "substantially justified" within the meaning of the EAJA. The Court of Appeals disagreed for the reasons stated in its previous decision in the case and reversed, concluding that an award of fees was proper under the EAJA. The court held that the award could include attorney's fees for work done at the administrative level after the cause was remanded to the Secretary by the District Court, rejecting the Secretary's argument that provisions of 5 U. S. C. § 504(a) (1982 ed., Supp. V) limited a court's power to award such fees for administrative proceedings to those situations "in which the position of the United States is represented by counsel." While recognizing that the Secretary was not so represented in the remand proceedings, the court found that the proceedings on remand were "adversarial" because the Secretary had taken an adversarial position in the judicial review proceedings prior to the remand.

Held: It is within a federal court's power under the EAJA to award a Social Security claimant attorney's fees for representation provided during administrative proceedings held pursuant to a district court order remanding the action to the Secretary. Pp. 883–893.

(a) An award of fees is proper in cases such as the present under § 2412(d)(1)(A), which provides for such an award to a "prevailing party . . . in any civil action . . . for judicial review of agency action . . . in any court having jurisdiction of that action, unless the court finds that the [Government's] position . . . was substantially justified." Where, as here, a court's § 405(g) remand to the Secretary for further proceedings does not necessarily dictate the receipt of benefits, the claimant will not normally attain "prevailing party" status until after the result of the administrative proceedings is known. Cf. *Hanrahan* v. *Hampton*, 446 U. S. 754; *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782. Furthermore, the EAJA requires that a fee application be filed "within thirty days of final judgment," § 2412(d)(1)(B), but often, as in this case, there will be no "final judgment" in a claimant's "civil action . . . for . . . review" until the successful completion of the remand proceedings before the Secretary. Moreover, the remanding court continues to retain "jurisdiction of that action" within the meaning of § 2412(d)(1)(A), and may exercise that jurisdiction to determine if its legal instructions on remand have been followed. Where administrative proceedings are intimately tied to the resolution of the judicial action and are necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part of the action for which fees may be awarded. *Pennsylvania* v. *Delaware Valley Citizens' Council*, 478 U. S. 546; *New York Gas Light Club, Inc.* v. *Carey*, 447 U. S. 54. Thus, the EAJA, read in light of its purpose of diminishing the deterrent effect of the cost of seeking review of agency action, permits a court, in its discretion, to award fees for services performed on remand before the Secretary if the court finds that the Secretary's position on judicial review was not "substantially justified." Pp. 883–890.

(b) The Secretary's interrelated challenges to this interpretation—(1) that the plain meaning of "civil action" excludes any proceedings outside a court of law, and (2) that a court may never award fees for time spent in nonadversarial proceedings before the Secretary because the EAJA, § 2412(d)(3), already empowers a court to award fees for representation before an agency to a prevailing party in a judicial action "to the same extent authorized in [5 U. S. C. § 504]"—are rejected. Even though Social Security benefit proceedings are not "adversarial" under § 504, they are so intimately connected with the judicial proceedings as to be considered part of the "civil action." Section 2412(d)(3) does not necessarily speak to, let alone preclude, such a reading, since, on its face, the provision says nothing about the power of a court to award fees for representation in a *nonadversarial* adjudication wholly ancillary to a "civil action." Pp. 890–892.

839 F. 2d 1453, affirmed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and KENNEDY, JJ., joined, *post*, p. 893.

Edwin S. Kneedler argued the cause for petitioner. On the briefs were former *Solicitor General Fried, Acting Solicitor General Bryson, Assistant Attorney General Bolton, Deputy Solicitor General Merrill, Harriet S. Shapiro,* and *William Kanter.*

James E. Coleman, Jr., argued the cause for respondent. With him on the brief were *Joseph E. Killory, Jr.*, and *Richard J. Ebbinghouse.*

JUSTICE O'CONNOR delivered the opinion of the Court.

The issue before us in this case is whether a Social Security claimant is entitled to an award of attorney's fees under the Equal Access to Justice Act for representation provided during administrative proceedings held pursuant to a district court order remanding the action to the Secretary of Health and Human Services.

I

Respondent Elmer Hudson filed an application for the establishment of a period of disability and for disability benefits under the Social Security Act, 49 Stat. 620, as amended, 42 U. S. C. § 401 *et seq.* (1982 ed. and Supp. V) on September 9, 1981. On the same day, she filed an application for supplemental security income under Title XVI of the Act. Respondent, now 50, submitted medical evidence indicating obesity, limitations in movement, and lower back pain. Her application for benefits was administratively denied, and that position was upheld on reconsideration by the Social Security Administration. Respondent requested and received a hearing before an Administrative Law Judge (ALJ), where she was represented by a Legal Services Corporation paralegal. At the hearing, respondent testified that she suffered from back pain, depression, and nervousness. Respondent was in a state of anxiety and cried throughout the hearing. The ALJ ordered a posthearing psychiatric examination by Dr. Anderson, a psychiatrist, and respondent's representative chose to have her undergo an additional evaluation by Dr. Myers, a clinical psychologist. Dr. Anderson's report indicated that respondent suffered from mild to moderate dysthymic disorder and a histrionic personality disorder. He concluded that respondent's psychological condition would not interfere with her ability to work in the domestic services area, where most of her past work experience lay. Dr. Myers found that respondent was moderately to severely depressed, suffered from insomnia, fatigue, psychomotor retardation, tearfulness, and anxiety. He concluded that her psychological problems, coupled with her mild physical disabilities and back pain, rendered her unemployable absent exhaustive rehabilitative efforts.

Based on these two reports, the ALJ rendered her decision finding that respondent was not disabled because she was capable of performing work similar to that she had done in the past. The ALJ's decision was approved by the Social Security Appeals Council, thus becoming the final decision of the Secretary concerning respondent's applications. Respondent then brought an action in the District Court for the Northern District of Alabama under 42 U. S. C. § 405(g) seeking judicial review of the Secretary's decision denying benefits. The District Court found that the Secretary's decision was supported by substantial evidence and affirmed the denial of benefits. App. to Pet. for Cert. 43a–44a. The Court of Appeals for the Eleventh Circuit reversed. It vacated the Secretary's decision and instructed the District Court to remand the case to the Secretary for reconsideration. *Hudson* v. *Heckler*, 755 F. 2d 781 (1985). The Court of Appeals agreed with respondent that "the Secretary did not follow her own regulations" in making the disability determination in respondent's case. *Id.*, at 785. The court found that those regulations required the Secretary to consider the cumulative effect of impairments even where no individual ailment considered in isolation would be disabling. *Ibid.* In respondent's case the ALJ had never considered the combined effect of respondent's physical and psychological afflictions. Nor had the ALJ given any reasons for her rejection of Dr. Myers' evaluation of the combined effects of respondent's physical and psychological conditions. *Id.*, at 785–786.

Following the District Court's remand order, the Social Security Appeals Council vacated its earlier denial of respondent's request for review and returned the case to an ALJ for further proceedings. App. to Pet. for Cert. 30a. The Appeals Council instructed the ALJ to provide respondent with an opportunity to testify at a supplemental hearing and to adduce additional evidence. *Id.*, at 31a. The Appeals Council also indicated that the ALJ might wish to obtain the services of a medical adviser to evaluate respondent's psychiatric impairment during the period at issue. *Ibid.* Finally, the Appeals Council instructed the ALJ to apply the revised regulations for determining disability due to mental disorders, which had been published by the Secretary in 1985 pursuant to statutory directive. *Ibid.* On remand, the ALJ found that respondent had been disabled as of May 15, 1981, as she had originally maintained in her initial applications for benefits. Respondent was represented before the ALJ in the remand proceedings by the same counsel who had represented her before the District Court and the Court of Appeals.

On October 22, 1986, the Appeals Council adopted the ALJ's recommended decision and instructed the Social Security Administration to pay respondent disability and supplemental income benefits. *Id.*, at 21a–23a. On December 11, 1986, the District Court, pursuant to the Secretary's motion, dismissed respondent's action for judicial review, finding that after the remand order respondent had obtained all the relief prayed for in her complaint. The District Court retained jurisdiction over the action for the limited purpose of considering any petition for the award of attorney's fees. Respondent then filed the instant petition for an award of attorney's fees under the Equal Access to Justice Act (EAJA), Pub. L. 96–481, 94 Stat. 2328, as amended, 28 U. S. C. §2412(d) (1982 ed., Supp. V). The District Court denied respondent's fee application *in toto*, finding that the position taken by the Secretary in the initial denial of benefits to respondent was "substantially justified." App. to Pet. for Cert. 17a–20a. The Court of Appeals again reversed. *Hudson* v. *Secretary of Health and Human Services*, 839 F. 2d 1453 (CA11 1988). The Court of Appeals noted that in its earlier opinion it had found that the Secretary had violated her own regulations by failing to consider the cumulative effect of respondent's ailments, and that the ALJ had failed to give her reasons for rejection of Dr. Myers' testimony concerning the cumulative effects of respondent's ailments. *Id.*, at 1457–1458. The Secretary's defense of the denial of benefits to respondent "on those two grounds was not substantially justified." *Id.*, at 1458. Having concluded that an award of attorney's fees was proper under the EAJA, the court went on to consider whether the award could include attorney's fees for work done at the administrative level after the cause was remanded to the Secretary by the District Court. The Court of Appeals rejected the Secretary's argument that 5 U. S. C. §§504(a)(1) and 504(b)(1)(C) (1982 ed., Supp. V) limited a court's power to award attorney's fees for administrative proceedings to those situations "in which the position of the United States is represented by counsel or otherwise. . . ." While recognizing that the Secretary was not represented by counsel in the remand proceedings at issue here, the Court of Appeals found that "the critical determination is whether the Secretary has staked out a position." 839 F. 2d, at 1460.

Since the Secretary had taken an adversarial position in the proceedings for judicial review prior to the remand, the Court of Appeals found that the proceedings were no less "adversarial" on remand before the agency, and therefore a fee award encompassing work performed before the agency on remand was proper. *Ibid.*

Because the Court of Appeals' decision granting attorney's fees for representation in administrative proceedings on remand from judicial review of a Social Security benefits determination conflicts with the decisions of other Courts of Appeals, see, *e. g.*, *Cornella* v. *Schweiker*, 728 F. 2d 978, 988–989 (CA8 1984), we granted the Secretary's petition for certiorari. *Sub nom. Bowen* v. *Hudson*, 488 U. S. 980 (1988).

II

In 1980, Congress passed the EAJA in response to its concern that persons "may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights." 94 Stat. 2325. As the Senate Report put it:

> "For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process. . . . When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it." S. Rep. No. 96–253, p. 5 (1979).

The EAJA was designed to rectify this situation by providing for an award of a reasonable attorney's fee to a "prevailing party" in a "civil action" or "adversary adjudication" unless the position taken by the United States in the proceeding at issue "was substantially justified" or "special circumstances make an award unjust." That portion of the Act applicable to "civil actions" provides, as amended, in relevant part that

> "[e]xcept as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U. S. C. § 2412(d)(1)(A) (1982 ed., Supp. V).

Application of this provision to respondent's situation here requires brief consideration of the structure of administrative proceedings and judicial review under the Social Security Act. Once a claim has been processed administratively, judicial review of the Secretary's decision is available pursuant to § 205(g) of the Social Security Act, 42 U. S. C. § 405(g), which provides in pertinent part:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, . . . may obtain a review of such decision by a civil action . . . . The court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. . . . The court may, on motion of the Secretary for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such addi-

> tional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based."

As provisions for judicial review of agency action go, § 405(g) is somewhat unusual. The detailed provisions for the transfer of proceedings from the courts to the Secretary and for the filing of the Secretary's subsequent findings with the court suggest a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the Administrative Procedure Act. As one source puts it:

> "The remand power places the courts, not in their accustomed role as external overseers of the administrative process, making sure that it stays within legal bounds, but virtually as coparticipants in the process, exercising ground-level discretion of the same order as that exercised by ALJs and the Appeals Council when they act upon a request to reopen a decision on the basis of new and material evidence." J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil, & M. Carrow, Social Security Hearings and Appeals 133 (1978).

Where a court finds that the Secretary has committed a legal or factual error in evaluating a particular claim, the district court's remand order will often include detailed instructions concerning the scope of the remand, the evidence to be adduced, and the legal or factual issues to be addressed. See, *e. g.*, *Cooper* v. *Bowen*, 815 F. 2d 557, 561 (CA9 1987). Often, complex legal issues are involved, including classification of the claimant's alleged disability or his or her prior work experience within the Secretary's guidelines or "grids" used for determining claimant disability. See, *e. g.*, *Cole* v. *Secretary of Health and Human Services*, 820 F. 2d 768, 772–773 (CA6 1987). Deviation from the court's remand order in the subsequent administrative proceedings is itself legal error, subject to reversal on further judicial review. See, *e. g.*, *Hooper* v. *Heckler*, 752 F. 2d 83, 88 (CA4 1985); *Mefford* v. *Gardner*, 383 F. 2d 748, 758–759 (CA6 1967). In many remand situations, the court will retain jurisdiction over the action pending the Secretary's decision and its filing with the court. See *Ahghazali* v. *Secretary of Health and Human Services*, 867 F. 2d 921, 927 (CA6 1989) (remanding action to District Court with instructions to retain jurisdiction during proceedings on remand before the agency); *Taylor* v. *Heckler*, 778 F. 2d 674, 677, n. 2 (CA11 1985) ("[T]he district court retains jurisdiction of the case until the proceedings on remand have been concluded"); accord, *Brown* v. *Secretary of Health and Human Services*, 747 F. 2d 878, 883–885 (CA3 1984). The court retains the power in such situations to assure that its prior mandate is effectuated. See *Ford Motor Co.* v. *NLRB*, 305 U. S. 364, 373 (1939).

Two points important to the application of the EAJA emerge from the interaction of the mechanisms for judicial review of Social Security benefits determinations and the EAJA. First, in a case such as this one, where a court's remand to the agency for further administrative proceedings does not necessarily dictate the receipt of benefits, the claimant will not normally attain "prevailing party" status within the meaning of § 2412(d)(1)(A) until after the result of the administrative proceedings is known. The situation is for all intents and purposes identical to that we addressed in *Hanrahan* v. *Hampton*, 446 U. S. 754 (1980). There we held that the reversal of a directed verdict for defendants on appeal did not render the plaintiffs in that action "prevailing parties" such that an interim award of attorney's fees would be justified under 42 U. S. C. § 1988. We found that such "procedural or evidentiary rulings" were not themselves "matters on which a party could 'prevail' for purposes of shifting his counsel fees to the opposing party under § 1988."

Id., at 759. More recently in *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782 (1989), we indicated that in order to be considered a prevailing party, a plaintiff must achieve some of the benefit sought in bringing the action. *Id.*, at 791–793. We think it clear that under these principles a Social Security claimant would not, as a general matter, be a prevailing party within the meaning of the EAJA merely because a court had remanded the action to the agency for further proceedings. See *Hewitt* v. *Helms*, 482 U. S. 755, 760 (1987). Indeed, the vast majority of the Courts of Appeals have come to this conclusion. See, *e. g.*, *Paulson* v. *Bowen*, 836 F. 2d 1249, 1252 (CA9 1988); *Swedberg* v. *Bowen*, 804 F. 2d 432, 434 (CA8 1986); *Brown* v. *Secretary of Health and Human Services, supra*, at 880–881.

Second, the EAJA provides that an application for fees must be filed with the court "within thirty days of final judgment in the action." 28 U. S. C. §2412(d)(1)(B) (1982 ed., Supp. V). As in this case, there will often be no final judgment in a claimant's civil action for judicial review until the administrative proceedings on remand are complete. See *Guthrie* v. *Schweiker*, 718 F. 2d 104, 106 (CA4 1983) ("[T]he procedure set forth in 42 U. S. C. §405(g) contemplates additional action both by the Secretary and a district court before a civil action is concluded following a remand"). The Secretary concedes that a remand order from a district court to the agency is not a final determination of the civil action and that the district court "retains jurisdiction to review any determination rendered on remand." Brief for Petitioner 16, 16–17.

Thus, for purposes of the EAJA, the Social Security claimant's status as a prevailing party and the final judgment in her "civil action . . . for review of agency action" are often completely dependent on the successful completion of the remand proceedings before the Secretary. Moreover, the remanding court continues to retain jurisdiction over the action within the meaning of the EAJA and may exercise that jurisdiction to determine if its legal instructions on remand have been followed by the Secretary. Our past decisions interpreting other fee-shifting provisions make clear that where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded.

In *Pennsylvania* v. *Delaware Valley Citizens' Council*, 478 U. S. 546 (1986), we considered whether the costs of representation before federal and state administrative agencies in defense of the provisions of a consent decree entered under the Clean Air Act were compensable under the fee-shifting provision of that statute. Section 304(d) of the Clean Air Act provides for the award of a reasonable attorney fee in conjunction with "any final order in any action brought pursuant to" certain provisions of the Act. 42 U. S. C. § 7604(d). In *Delaware Valley*, we rejected the contention that the word "action" in the fee-shifting provision should be read narrowly to exclude all proceedings which could be plausibly characterized as "nonjudicial." We indicated that

> "[a]lthough it is true that the proceedings [at issue] were not 'judicial' in the sense that they did not occur in a courtroom or involve 'traditional' legal work such as examination of witnesses or selection of jurors for trial, the work done by counsel in these two phases was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom which secured Delaware Valley's initial success in obtaining the consent decree." 478 U. S., at 558.

Similarly, in *New York Gas Light Club, Inc.* v. *Carey*, 447 U. S. 54 (1980), we held that under the fee-shifting provision of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–5(k), a federal court could award attorney's fees for services performed in state administrative and judicial enforcement proceedings. We noted that the words of the statute, authorizing "the court" to award attorney's fees "[i]n any action or proceeding under this title," could be read to include only federal administrative or judicial proceedings. 447 U. S., at 60–61. Looking to the entire structure of Title VII, we observed that Congress had mandated initial resort to state and local remedies, and that "Congress viewed proceedings before the Equal Employment Opportunity Commission and in federal court as supplements to available state remedies for employment discrimination." *Id.*, at 65. Given this interlocking system of judicial and administrative avenues to relief, we concluded that the exclusion of state and local administrative proceedings from the fee provisions would clearly clash with the congressional design behind the statutory scheme whose enforcement the fee-shifting provisions was designed to promote. *Ibid.* See also *Webb* v. *Dyer County Board of Education*, 471 U. S. 234, 243 (1985) (work performed in administrative proceedings that is "both useful and of a type ordinarily necessary to advance civil rights litigation" may be compensable under 42 U. S. C. § 1988); *North Carolina Dept. of Transportation* v. *Crest Street Community Council, Inc.*, 479 U. S. 6, 15 (1986).

We think the principles we found persuasive in *Delaware Valley* and *Carey* are controlling here. As in *Delaware Valley*, the administrative proceedings on remand in this case were "crucial to the vindication of [respondent's] rights." *Delaware Valley, supra*, at 561. No fee award at all would have been available to respondent absent successful conclusion of the remand proceedings, and the services of an attorney may be necessary both to ensure compliance with the District Court's order in the administrative proceedings themselves, and to prepare for any further proceedings before the District Court to verify such compliance. In addition, as we did in *Carey*, we must endeavor to interpret the fee statute in light of the statutory provisions it was designed to effectuate. Given the "mandatory" nature of the administrative proceedings at issue here, and their close relation in law and fact to the issues before the District Court on judicial review, we find it difficult to ascribe to Congress an intent to throw the Social Security claimant a lifeline that it knew was a foot short. Indeed, the incentive which such a system would create for attorneys to abandon claimants after judicial remand runs directly counter to long established ethical canons of the legal profession. See American Bar Association, Model Rules of Professional Conduct, Rule 1.16, pp. 53–55 (1984). Given the anomalous nature of this result, and its frustration of the very purposes behind the EAJA itself, Congress cannot lightly be assumed to have intended it. See *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 418–419 (1978). Since the judicial review provisions of the Social Security Act contemplate an ongoing civil action of which the remand proceedings are but a part, and the EAJA allows "any court having jurisdiction of that action" to award fees, 28 U. S. C. § 2412(d)(1)(A), we think the statute, read in light of its purpose "to diminish the deterrent effect of seeking review of, or defending against, governmental action," 94 Stat. 2325, permits a court to award fees for services performed on remand before the Social Security Administration. Where a court finds that the Secretary's position on judicial review was not substantially justified within the meaning of the EAJA, see *Pierce* v. *Underwood*, 487 U. S. 552, 563–568 (1988), it is within the court's discretion to conclude that representation on remand was necessary to the effectuation of its mandate and to the ultimate vindication of the claimant's rights, and that an award of fees for work performed in the administrative proceedings is therefore proper. See *Delaware Valley*, *supra*, at 561; *Webb*, *supra*, at 243.

The Secretary mounts two interrelated challenges to this interpretation of § 2412(d)(1)(A). While the Secretary's contentions are not without some force, neither rises to the level necessary to oust what we think is the most reasonable interpretation of the statute in light of its manifest purpose.

First, the Secretary argues that plain meaning of the term "civil action" in § 2412(d)(1)(A) excludes any proceedings outside of a court of law. Brief for Petitioner 12–13; Reply Brief for Petitioner 8–9. Of course, if the plain language of the EAJA evinced a congressional intent to preclude the interpretation we reach here, that would be the end of the matter. In support of this proposition, the Secretary points out that the "'[t]erm [action] in its usual legal sense means a suit brought in a court; a formal complaint within the jurisdiction of a court of law.'" Brief for Petitioner 13, n. 7, quoting Black's Law Dictionary 26 (5th ed. 1979). Second, the Secretary notes that Congress did authorize EAJA fee awards under 5 U. S. C. § 504(a)(1) (1982 ed., Supp. V) where an agency "conducts an adversary adjudication," and that an adversary adjudication is defined in § 504(b)(1)(C) as "an adjudication . . . in which the position of the United States is represented by counsel or otherwise." Under 28 U. S. C. § 2412(d)(3) (1982 ed., Supp. V) a court is empowered to award fees for representation before an agency to a party who prevails in an action for judicial review to "the same extent authorized in [5 U. S. C. § 504(a)]." Thus, the Secretary concludes that since benefits proceedings before the Secretary and his designates are nonadversarial, and a court is explicitly empowered to award fees for agency proceedings where such proceedings satisfy the requirements of § 504(a)(1), the principle of *expressio unius est exclusio alterius* applies, and a court may never award fees for time spent in nonadversarial administrative proceedings. See Brief for Petitioner 12–18; Reply Brief for Petitioner 7–12.

We agree with the Secretary that for purposes of the EAJA Social Security benefit proceedings are not "adversarial" within the meaning of § 504(b)(1)(C) either initially or on remand from a court. See *Richardson* v. *Perales*, 402 U. S. 389, 403 (1971). The plain language of the statute requires that the United States be represented by "counsel or otherwise," and neither is true in this context. Nonetheless, we disagree with the conclusion the Secretary would draw from this fact. First, as *Delaware Valley*, *Webb*, and *Carey* indicate, administrative proceedings may be so intimately connected with judicial proceedings as to be considered part of the "civil action" for purposes of a fee award. This is particularly so in the Social Security context where "a suit [has been] brought in a court," and where "a formal complaint within the jurisdiction of a court of law" remains pending and depends for its resolution upon the outcome of the administrative proceedings. Second, we disagree with the Secretary's submission that a negative implication can be drawn from the power granted a court to award fees based on representation in a prior adversary adjudication before an agency. Section 2412(d)(3) provides that "[i]n awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication," the court may award fees to the same extent that they would have been available before the agency itself under § 504(a)(1). On its face, the provision says nothing about the power of a court to award reasonable fees for representation in a *non-adversarial* adjudication which is wholly ancillary to a civil action for judicial review. That Congress carved the world of EAJA proceedings into "adversary adjudications" and "civil actions" does not necessarily speak to, let alone preclude, a reading of the term "civil action" which includes administrative proceedings necessary to the completion of a civil action.

We conclude that where a court orders a remand to the Secretary in a benefits litigation and retains continuing jurisdiction over the case pending a decision from the Secretary which will determine the claimant's entitlement to benefits, the proceedings on remand are an integral part of the "civil action" for judicial review, and thus attorney's fees for representation on remand are available subject to the other limitations in the EAJA. We thus affirm the judgment of the

Court of Appeals on this issue and remand the case to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

In 1985, Congress reenacted the Equal Access to Justice Act (EAJA), 99 Stat. 183, authorizing awards of attorney's fees to parties that prevail in litigation against the United States unless the position taken by the United States is substantially justified or the award unjust. Fees can be awarded only when "incurred . . . in any civil action . . . brought . . . in any court having jurisdiction of that action," 28 U. S. C. § 2412(d)(1)(A) (1982 ed., Supp. V), or when incurred in connection with an "adversary adjudication" conducted by an agency, 5 U. S. C. § 504(a)(1) (1982 ed., Supp. V). Congress refused to extend the EAJA to fees incurred in proceedings before the Social Security Administration, which are nonadversarial, leaving supporters of such an extension "a fight which will have to be fought another day." 131 Cong. Rec. 20350 (1985) (remarks of Sen. Heflin). The majority today awards those supporters a partial victory in that fight without either side having stepped into the legislative ring. Because this judicial TKO ignores the plain language of the EAJA as well as its legislative history, I dissent.

The majority correctly rejects the reasoning of the Court of Appeals that once the Secretary took a position in District Court, by arguing that respondent was not entitled to benefits, the case became an "adversary adjudication" and respondent was entitled under § 504(a)(1) to attorney's fees incurred on remand. As the majority concludes, this interpretation of § 504(a)(1) is flatly contrary to 5 U. S. C. § 504(b)(1)(C) (1982 ed., Supp. V), which defines "adversary adjudication" as one in which the "position of the United States is represented by counsel or otherwise." Proceedings before the Social Security Administration, even on remand from a district court, do not satisfy this requirement, as the majority recognizes. *Ante,* at 891.

Instead, the majority looks to § 2412(d)(1)(A), the provision of the EAJA dealing with fees incurred in "civil actions," as the basis for authorizing the award of fees at issue here. The majority reasons that "[s]ince the judicial review provisions of the Social Security Act contemplate an ongoing civil action of which the remand proceedings are but a part, and the EAJA allows 'any court having jurisdiction of that action' to award fees, 28 U. S. C. § 2412(d)(1)(A), . . . the statute . . . permits a court to award fees for services performed on remand before the Social Security Administration." *Ante,* at 890. In so construing § 2412, however, the majority has committed the same error that the Court of Appeals committed in construing § 504—in its effort to reach the result it desires, it ignores the plain language of the statute it is construing.

Section 2412(d)(1)(A), by its terms, does not authorize the recovery of fees incurred in proceedings on remand before the Social Security Administration. That section provides in relevant part that "a court shall award to a prevailing party other than the United States fees and other expenses . . . *incurred by that party in any civil action* . . . , including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action." (Emphasis added.) The plain meaning of "civil action" is a proceeding in a court, see Black's Law Dictionary 26, 222 (5th ed. 1979); Fed. Rules Civ. Proc. 2, 3, and any argument to the contrary is foreclosed by the statute itself—the civil action must be one brought "in any court having jurisdiction." Clearly, the Social Security Administration is not a court, see 28 U. S. C. § 451 (defining "court of the United States"), and so § 2412 does not apply to fees incurred in proceedings before the Social Security Administration.

Other language in § 2412(d)(1)(A) reinforces this conclusion. The section includes within the meaning of "civil action" the "judicial review of agency action." Congress thus was perfectly capable of distinguishing between judicial review by the courts and action by administrative agencies, such as the remand proceedings in this case. Section 2412 contains no similar authorization for recovery of fees for "agency action," whether or not on remand and regardless of how essential the proceeding might be to the claimant's ultimate recovery. In addition, the section makes liability for fees depend on the United States taking a position that is not substantially justified. But in proceedings before the Social Security Administration, the United States does not take any position (such proceedings are not adversarial, as the majority agrees), and so the majority's reading of the statute makes fee liability depend on a non sequitur.

Section 504, not § 2412, is the provision of the EAJA that governs the recovery of fees in proceedings before administrative agencies; indeed, Congress was careful to place § 504 in Title 5 of the United States Code, which governs procedures before administrative agencies, while placing § 2412 in Title 28, which governs procedures before the courts. The lack of any authorization in § 504(a)(1) for fees under the present circumstances provides further confirmation of the plain meaning of the EAJA. As the majority holds, the fee authorization in § 504(a)(1) is limited to adversary administrative adjudications, which do not include the nonadversary proceedings before the Social Security Administration. Applying the maxim of statutory construction *expressio unius est exclusio alterius*, the express congressional authorization for recovery of fees in adversary agency adjudications coupled with the lack of authorization for recovery of fees in nonadversary adjudications indicates Congress' intent not to authorize recovery of fees in nonadversary agency adjudications. See *TVA* v. *Hill*, 437 U. S. 153, 188 (1978).

The majority's dismissal of these arguments misses the mark. First, the majority takes the position that a "civil action" includes remand proceedings before the Social Security Administration because a formal complaint remains pending in court and depends on the outcome of the administrative proceeding for its resolution. *Ante*, at 892. But the mere retention of jurisdiction while the case is on remand before the agency does not transform fees incurred before the agency into fees incurred before the court. It was the Social Security Administration that conducted the proceedings on remand, and it was the Social Security Administration that ultimately made the award of benefits in this case, not the District Court. All the District Court did was to dismiss respondent's petition for judicial review once the agency had made its award on remand, which surely is not enough to characterize the agency proceedings as part of an ongoing civil action in court.

In this regard, the majority's reliance on *Pennsylvania* v. *Delaware Valley Citizens' Council*, 478 U. S. 546 (1986), and *New York Gas Light Club, Inc.* v. *Carey*, 447 U. S. 54 (1980), see *ante*, at 880–890, is misplaced. In *Delaware Valley*, we interpreted § 304(d) of the Clean Air Act, 42 U. S. C. § 7604(d), which allows the "court" to award fees "in issuing any final order in any action brought pursuant to" § 304(a) of the Act, as allowing recovery of fees incurred in enforcing a consent decree in administrative proceedings. But that Act applied to fee awards in "any action" brought under the Act, and did not expressly limit the award to fees "incurred . . . in any civil action . . . brought . . . in any court," as the statute does here. Moreover, the legislative history of the Clean Air Act equated "action" with "proceeding," suggesting a broader meaning to the term, and certainly did not expressly reject the construction we gave to the statute. Cf. *infra*, at 897–899. The same is true of *Carey*, in which this Court construed 42 U. S. C. § 2000e–5(k), authorizing "the court" to award fees "[i]n any action or proceeding under this title," as well as *Webb* v. *Dyer County Bd. of Education*, 471 U. S. 234, 243 (1985) (construing 42 U. S. C. § 1988), and *North Carolina Dept. of Transportation* v. *Crest Street Community Council, Inc.*, 479 U. S. 6, 15 (1986) (same), also cited by the majority. In short, these decisions have no application to the EAJA because its plain language indicates otherwise, as even the Court of Appeals in this case recognized. 839 F. 2d 1453, 1459 (CA11 1988).

Second, the majority rejects any negative implication from the express coverage of adversary agency adjudications by the statute. The majority reasons that the fact that "Congress carved the world of EAJA proceedings into 'adversary adjudications' and 'civil actions' does not necessarily speak to, let alone preclude, a reading of the term 'civil action' which includes administrative proceedings necessary to the completion of a civil action." *Ante,* at 892. But of course that necessarily is what the statute does. Maxims of statutory construction tell us what Congress ordinarily means when it expresses itself in certain ways. When Congress "carved the world of EAJA proceedings into 'adversary [agency] adjudications' and 'civil actions,'" excluding nonadversary agency adjudications, it meant that nonadversary agency adjudications, including remand proceedings before the agency, are not covered by the EAJA. The majority's argument is no more than fancy footwork.

I find the statutory language plainly and unambiguously to preclude the construction given the EAJA by the majority. But even if the language of the statute might somehow be seen as ambiguous, its legislative history makes unmistakably clear that Congress did not intend fees to be awarded under the EAJA for work done in proceedings on remand before the Social Security Administration.

Little need be said because the legislative history is so straightforward. That history makes clear that in reenacting the EAJA, Congress considered and rejected a provision that would have extended the EAJA to administrative proceedings before the Social Security Administration, including those on remand from district court. An early version of the 1984 bill reenacting the EAJA defined adversary adjudications to include "hearings pursuant to section 205 and section 1631 of the Social Security Act." S. Rep. No. 98–586, pp. 16, 33 (1984). This version was rejected by the House, 130 Cong. Rec. 24828–24829 (1984) (remarks of Rep. Morrison), and not included in the bill as passed by Congress, *id.*, at 29280 (remarks of Sen. Heflin), which was ultimately vetoed by the President. The bill that was passed by Congress in 1985 and ultimately signed into law likewise did not contain that language. Senator Heflin, an active supporter of the provision extending the EAJA to Social Security proceedings, acknowledged that this effort failed because of "institutional opposition." He stated: "While I believe this is an area ripe for protection, political realities dictate otherwise. And this seems to be a fight which will have to be fought another day." 131 Cong. Rec. 20350 (1985).

There is no suggestion in the legislative history that remand proceedings were somehow included elsewhere in the EAJA. To the contrary, the House Report on the 1985 reenactment expressly states that fees cannot be recovered under the EAJA in precisely the situation facing the Court. The House Report reads as follows:

> "The court will usually decline to make an award upon the remand decision because the remand order did not yet make the applicant a 'prevailing party' and therefore eligible under the EAJA. . . . [T]he remand decision is not a 'final judgment,' nor is the agency decision after remand. Instead, the District Court should enter an order affirming, modifying, or reversing the final HHS decision, and this will usually be the final judgment that starts the 30 days running. . . . As . . . courts have found the only fees which will be available will be for those activities *undertaken in connection with the initial proceedings and not those associated with the administrative proceeding.*" H. R. Rep. No. 99–120, pt. 1, pp. 19–20 (1985) (emphasis added).

This discussion does not, as respondent asserts, refer only to the initial administrative proceeding and not the proceeding on remand. Instead, this language affirms what the language of the EAJA likewise makes plain: that the EAJA does not authorize recovery of fees incurred in remand proceedings before the Social Security Administration.

Our duty is to apply statutes as they were enacted by Congress, not to take it upon ourselves to overcome the "political realities" that blocked what we might consider to be good legislation. However desirable it might be as a matter of policy for Social Security claimants to be able to recover attorney's fees for proceedings on remand before the agency, that is not the statute that Congress enacted. Therefore, I dissent.

LORANCE ET AL. *v.* AT&T TECHNOLOGIES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 87–1428. Argued March 20, 1989—Decided June 12, 1989

Before 1979 collective-bargaining agreements between respondents AT&T Technologies, Inc., and Local 1942, International Brotherhood of Electrical Workers, AFL–CIO, had determined a worker's seniority on the basis of years of plantwide service, and plantwide seniority was transferable upon promotion to a more skilled "tester" position. A new agreement executed in 1979 changed this by making seniority in tester jobs dependent upon the amount of time spent as a tester. In 1982 petitioners—women employees who were promoted to tester positions between 1978 and 1980—received demotions that they would not have sustained had the former seniority system remained in place. They filed charges with the Equal Employment Opportunity Commission in 1983, and after receiving right-to-sue letters filed the present action in the District Court, alleging that respondents had violated Title VII of the Civil Rights Act of 1964 by adopting the new seniority system with the purpose and effect of protecting incumbent testers—jobs traditionally dominated by men—from female employees who had greater plantwide seniority and who were becoming testers in increasing numbers. The court granted summary judgment for respondents on the ground that the charges had not been filed within the required period "after the alleged unlawful employment practice occurred," § 706(e) of Title VII, 42 U. S. C. § 2000e–5(e), and the Court of Appeals affirmed.

Held: Under § 703(h) of Title VII, 42 U. S. C. § 2000e–2(h), the operation of a seniority system having a disparate impact on men and women is not unlawful unless discriminatory intent is proved. *E. g., Pullman-Standard* v. *Swint*, 456 U. S. 273, 289; *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 65, 69; *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 82. It is not disputed that the seniority system at issue is facially nondiscriminatory (treats similarly situated employees alike) and is nondiscriminatorily applied. Its alleged invalidity rests on the claim that intentional discrimination produced the unfavorable *change* in petitioners' contractual seniority rights when respondents adopted the new system in 1979. The limitations period under § 706(e) therefore commenced at that point. *Delaware State College* v. *Ricks*, 449 U. S. 250; *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553. This rule strikes a balance between the interest in having valid claims vindicated and the interest in not adjudicating stale claims, which is heightened in this context by the special reliance interests that are protected by seniority systems. Pp. 904–913.

827 F. 2d 163, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, and KENNEDY, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 913. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 913. O'CONNOR, J., took no part in the consideration or decision of the case.

Barry Goldstein argued the cause for petitioners. With him on the briefs were *Julius LeVonne Chambers*, *Bridget Arimond*, and *Patrick O. Patterson*.

Charles A. Shanor argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Fried*, *Deputy Solicitor General Ayer*, *Richard J. Lazarus*, *Gwendolyn Young Reams*, and *Donna J. Brusoski*.

David W. Carpenter argued the cause for respondents. With him on the brief were *Rex E. Lee*, *Patrick S. Casey*, *Gerald D. Skoning*, *Charles C. Jackson*, *Michael H. Gottesman*, *Robert M. Weinberg*, *Joel A. D'Alba*, and *Stephen J. Feinberg*.*

JUSTICE SCALIA delivered the opinion of the Court.

Respondent AT&T Technologies, Inc. (AT&T), manufactures electronics products at its Montgomery Works plant. The three petitioners, all of whom are women, have worked as hourly wage employees in that facility since the early 1970's, and have been represented by respondent Local 1942, International Brotherhood of Electrical Workers, AFL–CIO. Until 1979 all hourly wage earners accrued competitive seniority exclusively on the basis of years spent in the plant,

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**Robert E. Williams*, *Douglas S. McDowell*, and *Katrina Grider* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging affirmance.

and a worker promoted to the more highly skilled and better paid "tester" positions retained this plantwide seniority. A collective-bargaining agreement executed by respondents on July 23, 1979, altered the manner of calculating tester seniority.[1] Thenceforth a tester's seniority was to be determined not by length of plantwide service, but by time actually spent as a tester (though it was possible to regain full plantwide seniority after spending five years as a tester and completing a prescribed training program). The present action arises from that contractual modification.

Petitioners became testers between 1978 and 1980. During a 1982 economic downturn their low seniority under the 1979 collective-bargaining agreement caused them to be selected for demotion; they would not have been demoted had the former plantwide seniority system remained in place. Claiming that the present seniority system was the product of an intent to discriminate on the basis of sex, petitioners filed complaints with the Equal Employment Opportunity Commission (EEOC) in April 1983. After the EEOC issued right-to-sue letters, petitioners in September 1983 filed the present lawsuit in the District Court for the Northern District of Illinois, and sought certification as class representatives for women employees of AT&T's Montgomery Works plant who had lost plantwide seniority or whom the new system had deterred from seeking promotions to tester positions. Their complaint alleged that among hourly wage earners the tester positions had traditionally been held almost exclusively by men, and nontester positions principally by women, but that in the 1970's an increasing number of women took the steps necessary to qualify for tester positions and exercised their seniority rights to become testers. They claimed that the 1979 alteration of the rules governing tester seniority was the product of a "conspir[acy] to change the seniority rules, in order to protect incumbent male testers and to discourage women from promoting into the traditionally-male tester jobs," and that "[t]he purpose and the effect of this manipulation of seniority rules has been to protect male testers from the effects of the female testers' greater plant seniority, and to discourage women from entering the traditionally-male tester jobs." App. 20, 21–22.

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[1] The type of seniority at issue here is not "benefit seniority," which is used to "compute *noncompetitive* benefits earned under the contract of employment," *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 766 (1976) (emphasis added), but "competitive seniority," which is "used to allocate entitlements to scarce benefits" such as promotion or nondemotion, *id.*, at 766–767.

On August 27, 1986, before deciding whether to certify the proposed class, the District Court granted respondents' motion for summary judgment on the ground that petitioners had not filed their complaints with the EEOC within the applicable limitations period.[2] 44 FEP Cases 1817, 1821. A divided panel of the Court of Appeals for the Seventh Circuit affirmed, concluding that petitioners' claims were time barred because "the relevant discriminatory act that triggers the period of limitations occurs at the time an employee becomes subject to a facially neutral but discriminatory seniority system that the employee knows, or reasonably should know, is discriminatory." 827 F. 2d 163, 167 (1987). We granted certiorari, 488 U. S. 887 (1988), to resolve a Circuit conflict on when the limitations period begins to run in a lawsuit arising out of a seniority system not alleged to be discriminatory on its face or as presently applied. Compare, *e. g.*, case below with *Cook* v. *Pan American*

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[2] Under 42 U. S. C. § 2000e–5(e), a charge must be filed with the EEOC within 180 days of the alleged unfair employment practice unless the complainant has first instituted proceedings with a state or local agency, in which case the period is extended to a maximum of 300 days. Neither the District Court nor the Court of Appeals ruled on the applicable limitations period in the present case, since both courts concluded that petitioners' claims were time barred even if the applicable period was 300 days. See 827 F. 2d 163, 165, and n. 2 (CA7 1987). We may for the same reason avoid ruling on that point here.

World Airways, 771 F. 2d 635, 646 (CA2 1985), cert. denied, 474 U. S. 1109 (1986).

Section 706(e) of Title VII of the Civil Rights Act of 1964, 78 Stat. 260, as amended, provides that "[a] charge . . . shall be filed [with the EEOC] within [the applicable period] after the alleged unlawful employment practice occurred." 42 U. S. C. § 2000e–5(e). Assessing timeliness therefore "requires us to identify precisely the 'unlawful employment practice' of which [petitioners] complai[n]." *Delaware State College* v. *Ricks*, 449 U. S. 250, 257 (1980). Under § 703(a) of Title VII, it is an "unlawful employment practice" for an employer

> "(1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a).

Petitioners' allegation of a disparate impact on men and women would ordinarily suffice to state a claim under § 703 (a)(2), since that provision reaches "practices that are fair in form, but discriminatory in operation," *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971); see *Connecticut* v. *Teal*, 457 U. S. 440, 446 (1982). "[S]eniority systems," however, "are afforded special treatment under Title VII," *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 81 (1977), by reason of § 703(h), which states:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of com-

> pensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . ." 42 U. S. C. § 2000e–2(h).

We have construed this provision to mean that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Hardison, supra,* at 82; see *American Tobacco Co.* v. *Patterson,* 456 U. S. 63, 65, 69 (1982). Thus, for liability to be incurred "there must be a finding of actual intent to discriminate on [statutorily proscribed] grounds on the part of those who negotiated or maintained the [seniority] system." *Pullman-Standard* v. *Swint,* 456 U. S. 273, 289 (1982).

Petitioners do not allege that the seniority system treats similarly situated employees differently or that it has been operated in an intentionally discriminatory manner. Rather, they claim that its differential impact on the sexes is unlawful because the system "ha[d] its genesis in [sex] discrimination." *Teamsters* v. *United States,* 431 U. S. 324, 356 (1977). Specifically, the complaint alleges that respondents "conspired *to change* the seniority rules, in order to protect incumbent male testers," and that the resulting agreement effected a "*manipulation of* seniority rules" for that "purpose." See App. 20–22 (emphasis added). This is in essence a claim of intentionally discriminatory *alteration* of their contractual rights. Seniority is a contractual right, Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1533 (1962), and a competitive seniority *system* establishes a "hierarchy [of such rights] . . . according to which . . . various employment benefits are distributed," *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747, 768 (1976). Under the collective-bargaining agreements in effect prior to 1979, each petitioner had earned the right to receive a favorable position in the hierarchy of seniority among testers (if and when she became a tester), and respondents eliminated those rights for reasons alleged to be discriminatory. Because this diminution in employment status occurred in 1979—well outside the period of limitations for a complaint filed with the EEOC in 1983—the Seventh Circuit was correct to find petitioners' claims time barred under § 706(e).

We recognize, of course, that it is possible to establish a different theoretical construct: to regard the employer as having been guilty of a continuing violation which "occurred," for purposes of § 706(e), not only when the contractual right was eliminated but also when each of the concrete effects of that elimination was felt. Or it would be possible to interpret § 703 in such fashion that when the proviso of § 703(h) is not met ("provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin") and that subsection's protection becomes unavailable, nothing *prevents* suits against the later effects of the system *on disparate-impact grounds* under § 703(a)(2). The answer to these alternative approaches is that our cases have rejected them.

The continuing violation theory is contradicted most clearly by two decisions, *Delaware State College* v. *Ricks*, 449 U. S. 250 (1980), and *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553 (1977). In *Ricks*, we treated an allegedly discriminatory denial of tenure—rather than the resulting nondiscriminatory termination of employment one year later—as the act triggering the limitations period under § 706(e). Because Ricks did not claim that "the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure," we held that "the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks." 449 U. S., at

258. "That is so," we found, "even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Ibid.* (emphasis in original). We concluded that "'[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.'"[3] *Ibid.* (emphasis in original); accord, *Chardon* v. *Fernandez*, 454 U. S. 6, 8 (1981) *(per curiam)*.

In *Evans*, United Air Lines had discriminatorily dismissed the plaintiff after she had worked several years as a flight attendant, and when it rehired her some years later, gave her no seniority credit for her earlier service. Evans conceded that the discriminatory dismissal was time barred, but claimed that the seniority system impermissibly gave "present effect to a past act of discrimination." 431 U. S., at 558. While agreeing with that assessment, we concluded under § 703(h) that "a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer." *Id.*, at 560. Like Evans, petitioners in the present case have asserted a claim that is wholly dependent on discriminatory conduct occurring well outside the period of limitations, and cannot complain of a continuing violation.

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[3] The dissent attempts to distinguish *Delaware State College* v. *Ricks* on the ground that there "[t]he allegedly discriminatory denial of tenure . . . served notice to the plaintiff that his termination a year later would come as a 'delayed, *but inevitable*, consequence.'" *Post*, at 917 (emphasis in original; citation omitted). This builds on its earlier criticism that "[o]n the day AT&T's seniority system was adopted, there was no reason to believe that a woman who exercised her plantwide seniority to become a tester would *ever* be demoted as a result of the new system," so that at that point the prospect of petitioners' suffering "concret[e] harm" was "speculative." *Post*, at 914 (emphasis in original). Of course the benefits of a seniority system, like those of an insurance policy payable upon the occurrence of a noninevitable event, are by their nature speculative—if only because they depend upon the employee's continuing desire to work for the particular employer. But it makes no more sense to say that no "concrete harm" occurs when an employer provides a patently less desirable seniority guarantee than what the law requires, than it does to say that no concrete harm occurs when an insurance company delivers an accident insurance policy with a face value of $10,000, when what has been paid for is a face value of $25,000. It is true that the injury to the employee becomes substantially *more* concrete when the less desirable seniority system causes his demotion, just as the injury to the policyholder becomes substantially more concrete when the accident occurs and the payment is $15,000 less than it should be. But that is irrelevant to whether there was *any* concrete injury at the outset. What the dissent means by "concrete harm" is what *Ricks*, 449 U. S., at 258, referred to as the point at which the injury becomes "most painful"—and that case rejected it as the point of reference for liability. Accord, *Chardon* v. *Fernandez*, 454 U. S. 6, 8 (1981) *(per curiam)*.

The second alternative theory mentioned above would view § 703(h) as merely providing an affirmative defense to a cause of action brought under § 703(a)(2), rather than as making intentional discrimination an element of any Title VII action challenging a seniority system. The availability of this affirmative defense would not alter the fact that the claim asserted is one of discriminatory impact under § 703(a)(2), causing the statute of limitations to run from the time that impact is felt. As an original matter this is a plausible, and perhaps even the most natural, reading of § 703(h). (We have construed § 703(e), 42 U. S. C. § 2000e–2(e)—which deals with bona fide occupational qualifications—in this fashion. See *Dothard* v. *Rawlinson*, 433 U. S. 321, 333 (1977).) But such an interpretation of § 703(h) is foreclosed by our cases, which treat the proof of discriminatory intent as a necessary element of Title VII actions challenging seniority systems. At least as concerns seniority plans, we have regarded subsection (h) not as a defense to the illegality described in subsection (a)(2), but as a provision that itself "delineates which employment practices are illegal and thereby prohibited and which are not." *Franks*, 424 U. S., at 758. Thus, in *American Tobacco Co.* we determined § 703(h) to mean that "the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate *must be proved.*" 456 U. S., at 65 (emphasis added). "To be cognizable," we held, "a claim that a seniority system has discriminatory impact *must* be accompanied by proof of a discriminatory purpose." *Id.*, at 69 (emphasis added); accord, *Pullman-Standard*, 456 U. S., at 277, 289; *Hardison*, 432 U. S., at 82. Indeed, in *California Brewers Assn.* v. *Bryant*, 444 U. S. 598 (1980), after deciding that a challenged policy was part of a seniority system, we noted that on remand to the District Court the *plaintiff* would "remain free to show that . . . the seniority system . . . is not 'bona fide' or that the differences in employment conditions that it has produced are 'the result of an intention to discriminate because of race,'" *id.*, at 610–611. Thus, petitioners' claim depends on proof of intentionally discriminatory adoption of the system, which occurred outside the limitations period.

That being the case, *Machinists* v. *NLRB*, 362 U. S. 411 (1960), establishes that the limitations period will run from the date the system was adopted (at least where the adoption occurred after the effective date of Title VII, and a cause of action against it was available). *Machinists* was a decision under the National Labor Relations Act (NLRA), but we have often observed that the NLRA was the model for Title VII's remedial provisions, and have found cases interpreting the former persuasive in construing the latter. See *Ford Motor Co.* v. *EEOC*, 458 U. S. 219, 226, n. 8 (1982); *Teamsters*, 431 U. S., at 366; *Franks, supra*, at 768–770; *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 419 (1975). Such reliance is particularly appropriate in the context presented here, since the highly unusual feature of requiring an administrative complaint before a civil action can be filed against a private party is common to the two statutes. The NLRA's statute of limitations—which provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board," 29 U. S. C. § 160(b)—is even substantively similar to § 706(e)—which states that "[a] charge . . . shall be filed [with the EEOC] within one hundred and eighty days after the alleged unlawful employment practice occurred," 42 U. S. C. § 2000e–5(e). In *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982), we specifically relied on cases construing the NLRA's timely filing requirement in determining whether § 706(e)—the very provision we construe here—constituted a waivable statute of limitations or rather a jurisdictional prerequisite to a Title VII action. "Because the time requirement for filing an unfair labor practice charge under the National Labor Relations Act operates as a statute of limitations subject to recognized equitable doctrines and not as a restriction of the jurisdiction of the National Labor Relations Board," we said, "the time limitations under Title VII should be treated likewise." 455 U. S., at 395, n. 11 (citations omitted).

Machinists considered and rejected an approach to the limitations period identical to that advanced here. The suit involved the timeliness of an unfair labor practice complaint directed at a so-called "union security clause," which required all employees to join the union within 45 days of the contract's execution. Under the NLRB's precedents, agreeing to such a clause when the union lacked majority status constituted an unfair labor practice, as did continued enforcement of the clause. 362 U. S., at 413–414. The agreement at issue in *Machinists* had been *adopted* more than six months before the complaint issued (outside the limitations period), but had been *enforced* well within the period of limitations. "Conceding that a complaint predicated on the *execution* of the agreement here challenged was barred by limitations," the NLRB contended that "its complaint was nonetheless timely since it was 'based upon' the parties' continued *enforcement*, within the period of limitations, of the union security clause." *Id.*, at 415 (emphasis in original). We found, however, that "the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective-bargaining agreement was signed," and that "[i]n the absence of that fact enforcement of this otherwise valid union security clause was wholly benign." *Id.*, at 417. "[W]here a complaint based upon that earlier event is time-barred," we reasoned, "to permit the event itself" "to cloak with illegality that which was otherwise lawful" "in effect results in reviving a legally defunct unfair labor practice." *Ibid.*[4] This analysis is squarely in point here. Because the claimed invalidity of the facially nondiscriminatory and neutrally applied tester seniority system is wholly dependent on the alleged illegality of signing the underlying agreement, it is the date of that signing which governs the limitations period.

In holding that, when a seniority system is nondiscriminatory in form and application, it is the allegedly discriminatory *adoption* which triggers the limitations period, we respect not only § 706(e)'s general "'value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale [claims],'" *Ricks*, 449 U. S., at 260 (citation omitted), but also the considerations underlying the "special treatment" accorded to seniority systems under § 703(h), see

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[4] Like *Ricks* and *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553 (1977), our decision in *Machinists* v. *NLRB* also rejected an attempt to cure untimeliness by asserting a continuing violation:

"The applicability of these principles cannot be avoided here by invoking the doctrine of continuing violation. It may be conceded that the continued enforcement, as well as the execution, of this collective bargaining agreement constitutes an unfair labor practice, and that these are two logically separate violations, independent in the sense that they can be described in discrete terms. Nevertheless, the vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validly executed, but unlawfully administered." 362 U. S., at 422–423.

Hardison, 432 U. S., at 81. This "special treatment" strikes a balance between the interests of those protected against discrimination by Title VII and those who work—perhaps for many years—in reliance upon the validity of a facially lawful seniority system. There is no doubt, of course, that a facially discriminatory seniority system (one that treats similarly situated employees differently) can be challenged at any time,[5] and that even a facially neutral system, if it is adopted with unlawful discriminatory motive, can be challenged within the prescribed period after adoption. But allowing a facially neutral system to be challenged, and entitlements under it to be altered, many years after its adoption would disrupt those valid reliance interests that § 703(h) was meant to protect. In the context of the present case, a female tester could defeat the settled (and worked-for) expectations of her co-workers whenever she is demoted or not promoted under the new system, be that in 1983, 1993, 2003, or beyond. Indeed, a given plaintiff could in theory sue successively for not being promoted, for being demoted, for being laid off, and for not being awarded a sufficiently favorable pension, so long as these acts—even if nondiscriminatory in themselves—could be attributed to the 1979 change in seniority. Our past cases, to which we adhere today, have declined to follow an approach that has such disruptive implications.

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[5] The dissent is mistaken to equate the application of a facially neutral but discriminatorily adopted system with the application of a system that is facially discriminatory. See *post*, at 916–917. With a facially neutral system the discriminatory act occurs *only* at the time of adoption, for each application is nondiscriminatory (seniority accrues for men and women on an identical basis). But a facially discriminatory system (*e. g.*, one that assigns men twice the seniority that women receive for the same amount of time served) by definition discriminates each time it is applied. This is a material difference for purposes of the analysis we employed in *Evans* and *Ricks*—which focuses on the timing of the *discriminatory* acts for purposes of the statute of limitations. It is also why the dissent's citation, *post*, at 915, of *Bazemore* v. *Friday*, 478 U. S. 385 (1986)—in which "[e]ach week's paycheck . . . deliver[ed] less to a black than to a similarly situated white," *id.*, at 395—is misplaced.

* * *

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

JUSTICE STEVENS, concurring.

Although I remain convinced that the Court misconstrued Title VII in *American Tobacco Co.* v. *Patterson*, 456 U. S. 63 (1982), see *id.*, at 86–90 (dissenting opinion), and in *Delaware State College* v. *Ricks*, 449 U. S. 250 (1980), see *id.*, at 265–267 (dissenting opinion), the Court has correctly applied those decisions to the case at hand. And it is the Court's construction of the statute—rather than the views of an individual Justice—that becomes a part of the law. See *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616, 644 (1987) (STEVENS, J., concurring); *Dougherty County Bd. of Education* v. *White*, 439 U. S. 32, 47 (1978) (STEVENS, J., concurring). Accordingly, I join the Court's opinion.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

The majority holds today that, when it is alleged that an employer and a union have negotiated and adopted a new seniority system with the intention of discriminating against women in violation of Title VII, 42 U. S. C. § 2000e *et seq.*, the limitations period set forth in § 706(e), § 2000e–5(e), begins to run immediately upon the adoption of that system. *Ante*, at 909–911. This is so even if the employee who subsequently challenges that system could not reasonably have expected to be demoted or otherwise concretely harmed by the new system at the time of its adoption, and, indeed, even if the employee was not working in the affected division of the company at the time of the system's adoption. This severe interpretation of § 706(e) will come as a surprise to Congress, whose goals in enacting Title VII surely never included conferring absolute immunity on discriminatorily adopted seniority systems that survive their first 300 days.[1] Because the harsh reality of today's decision, requiring employees to sue anticipatorily or forever hold their peace, is so glaringly at odds with the purposes of Title VII, and because it is compelled neither by the text of the statute nor our precedents interpreting it, I respectfully dissent.

The facts of this case illustrate the austere practical consequences of the majority's holding. On the day AT&T's seniority system was adopted, there was no reason to believe that a woman who exercised her plantwide seniority to become a tester would *ever* be demoted as a result of the new system. Indeed, under the new system, after five years a woman tester would regain her plantwide seniority; only in the intervening five years was she potentially endangered. Patricia Lorance, who was already a tester when the new system was adopted, almost made it; only after four years as a tester was she demoted under the terms of the new system. That the new system would concretely harm petitioners Janice King and Carol Bueschen was even more speculative. They became testers several months *after* the seniority system was modified, and like Lorance, they were not adversely affected by the restructured seniority system until 1982. (Indeed, absent the nationwide recession in the early 1980's, the petitioners might never have been affected.) Today, however, the majority concludes that these women are barred from bringing this suit because they failed to anticipate, within 300 days of the new system's adoption, that these contingencies would one day place them among the new system's casualties.

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[1] Or, in the case of a complaint not previously filed with a state or local agency, systems that survive their first 180 days. 42 U. S. C. § 2000e-(5)(e); *ante*, at 903, n. 2.

Nothing in the text of Title VII compels this result. On the contrary, even the majority concedes that a plausible reading of Title VII would regard the employer as having violated § 703(a)(1), 42 U. S. C. § 2000e–2(a)(1), the disparate-treatment wing of the statute, not only at the time of the system's adoption, but also when each concrete effect of that system is felt. *Ante*, at 906; see also 827 F. 2d 163, 166 (CA7 1987) (describing this interpretation as "logically appealing"). Under this continuing violation theory, each time a discriminatory seniority system is applied, like each time a discriminatory salary structure is applied, an independent "unlawful employment practice" under § 703(a)(1) takes place, triggering the limitations period anew. See *Bazemore* v. *Friday*, 478 U. S. 385, 395–396 (1986) ("Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII"); cf. *Havens Realty Corp.* v. *Coleman*, 455 U. S. 363, 380 (1982) ("Where the challenged violation is a continuing one, the staleness concern disappears"). Viewing each application of a discriminatory system as a new violation serves the equal opportunity goals of Title VII by ensuring that victims of discrimination are not prevented from having their day in court.

Today's decision is the latest example of how this Court, flouting the intent of Congress, has gradually diminished the application of Title VII to seniority systems. First, the Court held that § 703(h), 42 U. S. C. § 2000e–2(h), requires special treatment for bona fide seniority systems under Title VII so that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 82 (1977); see also *Pullman-Standard* v. *Swint*, 456

U. S. 273, 289 (1982).[2] Then, the Court held by a narrow margin that § 703(h) protects even those seniority systems put into place *after* the passage of Title VII. *American Tobacco Co* v. *Patterson*, 456 U. S. 63, 71 (1982).

The majority contends that the result it reaches today is dictated by these and other ill-advised precedents involving seniority systems, but in my view, today's decision compounds the Court's prior decisional errors by giving them unnecessarily broad scope. This extension is particularly inappropriate because it forces the Court to reach such a bizarre and impractical result. Never have we held or even intimated that, in the context of a statute of limitations inquiry, one must evaluate challenges to a seniority system born of discriminatory intent as of the moment of its adoption. Indeed, had we so held, the majority's concession that a worker may *at any time* challenge a facially discriminatory seniority plan under § 703(a)(1) would be flatly contradicted by precedent. *Ante*, at 912. The discriminatory intent that goes into the creation of even a facially flawed seniority plan is, after all, no different than the discriminatory intent that informs the creation of a facially neutral one. To impute ongoing intent in the former situation but not in the latter is untenable. The distinction the majority erects today serves only to reward those employers ingenious enough to cloak their acts of discrimination in a facially neutral guise, identical though the effects of this system may be to those of a facially discriminatory one.

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[2] It remains astonishing to me that seniority systems are sheltered from disparate-impact claims, see *Teamsters* v. *United States*, 431 U. S. 324, 377–394 (1977) (opinion of MARSHALL, J.). Even the majority concedes that "[a]s an original matter . . . a plausible, and perhaps even the most natural, reading of § 703(h)" regards that subsection as merely providing an affirmative defense to a disparate-impact action brought under § 703(a)(2). *Ante*, at 908.

But even accepting our precedents, I do not believe, as the majority does, that they prohibit the Court from finding that petitioners have made a timely and colorable claim of disparate impact under § 703(a)(2). 42 U. S. C. § 2000e–2(a)(2). In *Trans World Airlines* v. *Hardison*, 432 U. S. 63 (1977), we held only that bona fide seniority systems were exempted by § 703(h) from disparate-impact claims. Accepting as true petitioners' allegation that AT&T and its union restructured the seniority system for discriminatory reasons, this system should not qualify as a bona fide one entitled to immunity from disparate-impact claims.

Neither *United Air Lines Inc.* v. *Evans*, 431 U. S. 553 (1977), nor *Delaware State College* v. *Ricks*, 449 U. S. 250 (1980), on which the majority premises its rejection of the continuing violation theory, compels today's result. In *Evans*, unlike the instant case, the plaintiff never alleged that the seniority system itself was set up in order to discriminate. Indeed, we observed that Evans "does not attack the bona fides of United's seniority system" and "makes no charge that the system is intentionally designed to discriminate." 431 U. S., at 560; see also *id.*, at 557. The sole discrimination alleged in *Evans* was in the plaintiff's prior discharge, the impact of which, she alleged, had been enhanced upon her return to work by the failure of the seniority system to accord her credit for time she would have served had she not been discharged. In denying her challenge to that system, we held that "a challenge to a neutral system may not be predicated on the mere fact that a past event [Evan's prior discharge] which has no present legal significance has affected the calculation of seniority credit." *Id.*, at 560. That holding is plainly inapposite here, where the very essence of petitioners' claim is that AT&T's discriminatorily adopted seniority system is *not* neutral. Thus, the majority's conclusion that the "past event" cited in this case—the discriminatory adoption of the very seniority system under legal challenge—has "'no present legal significance,'" *ibid.*, quoted *ante*, at 908, is *ipse dixit.*

Ricks is likewise inapposite. The allegedly discriminatory denial of tenure in that case served notice to the plaintiff that his termination a year later would come as a "delayed, *but inevitable* consequence," 449 U. S., at 257–258 (emphasis added). It was thus appropriate, as in so many areas involving statutes of limitations doctrine, to set the limitations clock running upon the plaintiff's discovery of harm to herself. Petitioners Lorance, King, and Bueschen, however, were given no such advance warning. For them, the majority holds, the limitations clock began running, and ran out, long before it was apparent that they would be demoted by AT&T's discriminatory system. Like *Evans*, *Ricks* stands for the proposition that neutral employment practices that passively perpetuate the consequences of prior, time-barred discrimination but are not themselves bred of discriminatory intent do not constitute actionable wrongs under Title VII. Neither case suggests that the operation of a seniority system set up *in order* to discriminate should be treated the same way as a legitimate seniority (or tenure) system, born of nondiscriminatory motives, which in a particular case may have the effect of passively reinforcing prior time-barred acts of discrimination.

Nor, finally, is it correct to say that *Machinists* v. *NLRB*, 362 U. S. 411 (1960), "establishes that the limitations period will run from the date the system was adopted," *ante*, at 909, and therefore controls this case. Initially, it bears mention that *Machinists* arose under a different statute, the National Labor Relations Act (NLRA), 29 U. S. C. §§151–169, and that *Machinists* did not involve a seniority system, but instead a union security clause which, it was alleged, had been defectively adopted. Significant though the role of the NLRA was as a model for Title VII's remedial provisions, these are hardly the indicia of a controlling precedent. Moreover, sound reasons support the finding of a time bar in *Machinists*, but no time bar here. In *Machinists*, as in *Ricks*, the enforcement of the challenged security clause was the inevitable consequence of its execution. The clause affected all nonunion employees alike, and from its very inception there was no mystery about which employees would be affected and about the impact it would have on them. By contrast, in this case, the very essence of petitioners' claim is that AT&T's new seniority system was designed to have a long-range discriminatory impact, hurting women employees as a group but, as of the time of its inception, only theoretically hurting particular woman employees. Unlike *Machinists*, there is no indication that anyone employed at AT&T was, during the limitations period chosen by the majority, so tangibly affected by the new plan as to create any incentive to sue.[3]

The majority today continues the process of immunizing seniority systems from the requirements of Title VII. In addition to the other hurdles previously put in place by the Court, employees must now anticipate, and initiate suit to prevent, future adverse applications of a seniority system, no matter how speculative or unlikely these applications may be. This Court's observation that "limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes," *Ricks*, *supra*, at 262, n. 16, has an increasingly hollow ring. Because I do not believe that Congress, in framing Title VII, even remotely contemplated putting employees into the predicament which the majority today makes inevitable, I dissent.

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[3] Tellingly, none of the Courts of Appeals presented with a claim of a continuing violation has reached the result the majority today reaches. Indeed, two of the Courts of Appeals have interpreted our precedents to *permit* claims of continuing violation. *Cook* v. *Pan American World Airways, Inc.*, 771 F. 2d 635, 646 (CA2 1985); cf. *Johnson* v. *General Electric*, 840 F. 2d 132, 135 (CA1 1988). Even the Seventh Circuit, finding petitioners' claim time barred in the judgment under review, adopted a far narrower interpretation than the majority, under which the limitations period begins to run on the date when the employee first becomes subject to the seniority system. 827 F. 2d 163, 167 (1987).

CALIFORNIA ET AL. *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87–1165. Argued November 28, 1988—Decided June 12, 1989

830 F. 2d 139, affirmed by an equally divided Court.

Jerome C. Muys argued the cause for petitioners. With him on the briefs were *Warren J. Abbott, Fred Vendig, Karen L. Tachiki, James F. Roberts, Justin McCarthy, John K. Van de Kamp,* Attorney General of California, *R. H. Connett* and *N. Gregory Taylor,* Assistant Attorneys General, and *Douglas B. Noble,* Deputy Attorney General, *Robert K. Corbin,* Attorney General of Arizona, and *Anthony B. Ching,* Solicitor General.

Edwin S. Kneedler argued the cause for the United States. With him on the brief were *Solicitor General Fried, Assistant Attorney General Marzulla, Deputy Solicitor General Wallace, Edward J. Shawaker,* and *Sarah P. Robinson.*

Dale T. White argued the cause for the tribal respondents. With him on the brief were *William E. Strickland* and *Scott B. McElroy.*[*]

PER CURIAM.

The judgment below is affirmed by an equally divided Court.

JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[*] *Richard Dauphinais* filed a brief for the Klamath Tribe et al. as *amici curiae* urging affirmance.

REPORTER'S NOTE

The next page is purposely numbered 1001. The numbers between 920 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR APRIL 3 THROUGH JUNE 12, 1989

April 3, 1989

Dismissal Under Rule 53

No. 88–1036. Hodes et ux. *v.* Lauro Lines s.r.l. et al. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 858 F. 2d 905.

Affirmed on Appeal

No. 87–2118. Rojas et al. *v.* Victoria Independent School District et al. Affirmed on appeal from D. C. S. D. Tex. Justice White and Justice Scalia would note probable jurisdiction and set case for oral argument.

Appeal Dismissed

No. 88–1340. Wishart et ux. *v.* Bates et al. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 531 So. 2d 955.

Certiorari Granted—Vacated and Remanded

No. 87–255. Zohdi et al. *v.* Federal Savings and Loan Insurance Corporation, as Receiver of Sun Belt Federal Bank, F. S. B., et al. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Coit Independence Joint Venture* v. *FSLIC*, 489 U. S. 561 (1989). Reported below: 826 F. 2d 1391.

No. 87–1706. Jenkins, Superintendent of District of Columbia Public Schools, et al. *v.* Jones. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602 (1989), and *Treasury Employees* v. *Von Raab*, 489 U. S. 656 (1989). Justice Stevens would deny certiorari. Reported below: 266 U. S. App. D. C. 85, 833 F. 2d 335.

No. 88–557. MICHIGAN *v.* LEIGH. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Arizona* v. *Youngblood,* 488 U. S. 51 (1988). JUSTICE STEVENS would deny certiorari.

No. 88–1121. BRADLEY ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position presently asserted by the Acting Solicitor General in the Brief for the United States filed March 8, 1989. THE CHIEF JUSTICE, JUSTICE WHITE, JUSTICE SCALIA, and JUSTICE KENNEDY would deny certiorari. Reported below: 856 F. 2d 575.

No. 88–1350. SMITH ET AL. *v.* SOWERS. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *DeShaney* v. *Winnebago County Dept. of Social Services,* 489 U. S. 189 (1989). Reported below: 869 F. 2d 591.

Miscellaneous Orders

No. A–761. GARGALLO *v.* QUICK & REILLY CLEARING ET AL. D. C. S. D. Ohio. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. 87–1965. ZINERMON ET AL. *v.* BURCH. C. A. 11th Cir. [Certiorari granted, 489 U. S. 1064.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 88–309. WYOMING *v.* UNITED STATES ET AL. Sup. Ct. Wyo. [Certiorari granted, 488 U. S. 1040.] Motion of the Acting Solicitor General for divided argument granted.

No. 88–412. HOFFMAN, TRUSTEE *v.* CONNECTICUT DEPARTMENT OF INCOME MAINTENANCE ET AL. C. A. 2d Cir. [Certiorari granted, 488 U. S. 1003.] Motion of the Acting Solicitor General for divided argument granted.

No. 88–599. WASHINGTON ET AL. *v.* HARPER. Sup. Ct. Wash. [Certiorari granted, 489 U. S. 1064.] Motion for appointment of counsel granted, and it is ordered that Brian Reed Phillips, Esq., of Everett, Wash., be appointed to serve as counsel for respondent in this case.

No. 88–605. WEBSTER, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* REPRODUCTIVE HEALTH SERVICES ET AL. C. A. 8th Cir. [Probable jurisdiction noted, 488 U. S. 1003.] Motion of Robert Packwood et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied.

No. 88–5890. IN RE MCDONALD. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [489 U. S. 180] denied.

No. 88–6855 (A–773). IN RE CAMPBELL. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Petition for writ of mandamus and/or prohibition denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of mandamus and/or prohibition.

Certiorari Granted. (See also No. 87–980, *ante*, at 41, n. 15.)

No. 88–931. CRANDON ET AL. *v.* UNITED STATES; and

No. 88–938. BOEING CO., INC. *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 845 F. 2d 476.

No. 88–1182. BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES *v.* BOUKNIGHT; and

No. 88–6651. MAURICE M. *v.* BOUKNIGHT. Ct. App. Md. Motion of respondent Jacqueline Bouknight for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following questions:

"1. Does a court order directing a parent to produce her previously abused infant son compel incriminating testimony in violation of the parent's Fifth Amendment privilege against self-incrimination?

"2. Even if the Fifth Amendment privilege is implicated by a court order to produce a child, is the privilege overcome by the important societal interest in protecting children in jeopardy of serious injury?"

Cases consolidated and a total of one hour allotted for oral argument. Reported below: 314 Md. 391, 550 A. 2d 1135.

Certiorari Denied. (See also No. 88–1340, *supra.*)

No. 87–452. FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR BEVERLY HILLS SAVINGS & LOAN ASSN. *v.* MURDOCK-SC ASSOCIATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 815 F. 2d 82.

No. 88–66. COPELAND *v.* PHILADELPHIA POLICE DEPARTMENT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 840 F. 2d 1139.

No. 88–250. LAZAR *v.* UNITED STATES; and
No. 88–278. FRIEDMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 854 F. 2d 535.

No. 88–645. ALVERADO ET AL. *v.* WASHINGTON PUBLIC POWER SUPPLY SYSTEM ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 111 Wash. 2d 424, 759 P. 2d 427.

No. 88–659. FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER OF EMPIRE SAVINGS & LOAN ASSN. *v.* GLEN RIDGE I CONDOMINIUMS, LTD., ET AL. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 734 S. W. 2d 374.

No. 88–706. POLICEMEN'S BENEVOLENT ASSOCIATION OF NEW JERSEY, LOCAL 318, ET AL. *v.* TOWNSHIP OF WASHINGTON, NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 850 F. 2d 133.

No. 88–732. HELMSLEY ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 866 F. 2d 19.

No. 88–888. POINDEXTER ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 273 U. S. App. D. C. 240, 859 F. 2d 216.

No. 88–1049. GRANGE INSURANCE ASSN. *v.* WASHINGTON ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 110 Wash. 2d 752, 757 P. 2d 933.

No. 88–1055. YEAUGER *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 27 M. J. 199.

No. 88–1072. TENNESSEE ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 859 F. 2d 20.

No. 88–1119. MESSIAH BAPTIST CHURCH ET AL. *v.* JEFFERSON COUNTY, COLORADO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 859 F. 2d 820.

No. 88–1144. PENTHOUSE INTERNATIONAL, LTD., ET AL. *v.* DOMINION FEDERAL SAVINGS & LOAN ASSN. ET AL.; and

No. 88–1339. DOMINION FEDERAL SAVINGS & LOAN ASSN. *v.* PENTHOUSE INTERNATIONAL, LTD., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 855 F. 2d 963.

No. 88–1160. CORNELIUS, PERSONAL REPRESENTATIVE OF THE ESTATE OF MCDONALD *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 853 F. 2d 1494.

No. 88–1161. DORNHOFER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 859 F. 2d 1195.

No. 88–1166. LOWE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 860 F. 2d 1370.

No. 88–1170. BOISE-KUNA IRRIGATION DISTRICT ET AL. *v.* UNITED STATES ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 115 Idaho 1, 764 P. 2d 78.

No. 88–1173. PENDLEY, ADMINISTRATOR OF THE ESTATE OF CASSUTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 856 F. 2d 699.

No. 88–1187. WINKLER ET AL. *v.* SPINNATO, COMMISSIONER OF THE FIRE DEPARTMENT OF THE CITY OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 72 N. Y. 2d 402, 530 N. E. 2d 835.

No. 88–1253. BUSACCA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 863 F. 2d 433.

No. 88–1310. BRENT *v.* NATIONAL RAILROAD PASSENGER CORPORATION, DBA AMTRAK, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 859 F. 2d 918.

No. 88–1311. ALLSTATE INSURANCE CO. *v.* BOURLAND, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BOURLAND. Sup. Ct. Ark. Certiorari denied. Reported below: 296 Ark. 488, 758 S. W. 2d 700.

No. 88–1313. GHOSH *v.* OHIO UNIVERSITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 861 F. 2d 720.

No. 88–1315. WU *v.* BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 847 F. 2d 1480.

No. 88–1316. COMPRESSED GAS CORP. *v.* UNITED STATES STEEL CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 857 F. 2d 346.

No. 88–1320. WONDERWHEEL ET AL. *v.* BRADY ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88–1322. CITY OF WHITTIER, CALIFORNIA *v.* WALNUT PROPERTIES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 861 F. 2d 1102.

No. 88–1325. PAXSON ELECTRIC CO. ET AL. *v.* UNITED STATES; and

No. 88–1328. DYNALECTRIC CO. ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 859 F. 2d 1559.

No. 88–1330. GETTY PETROLEUM CORP. *v.* SALEM HEAT & PETROLEUM CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 862 F. 2d 10.

No. 88–1332. GEKAS, TRUSTEE OF MET-L-WOOD CORP. *v.* PIPIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 861 F. 2d 1012.

No. 88–1333. ROBINSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 381 Pa. Super. 660, 548 A. 2d 643.

No. 88–1335. GETTY PETROLEUM CORP. *v.* BARTCO PETROLEUM CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 858 F. 2d 103.

No. 88–1337. Soifer *v.* Bankers Trust Co. et al.; and
No. 88–1351. Rhoades et al. *v.* Bankers Trust Co. et al. C. A. 2d Cir. Certiorari denied. Reported below: 859 F. 2d 1096.

No. 88–1341. San Fernando Valley Neighborhood Legal Services, Inc., as Counsel for DuBose, et al. *v.* Kemp, Secretary of Housing and Urban Development, et al. C. A. 2d Cir. Certiorari denied. Reported below: 857 F. 2d 889.

No. 88–1356. Constant *v.* Advanced Micro-Devices, Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 862 F. 2d 320.

No. 88–1390. Lowery *v.* Lowery. Ct. App. Ohio, Sandusky County. Certiorari denied.

No. 88–1405. Brown *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 534 So. 2d 1019.

No. 88–1410. Kondrat *v.* Moyer et al. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 258.

No. 88–1413. Fitzgerald *v.* Sullivan, Secretary, United States Department of Health and Human Services. C. A. 4th Cir. Certiorari denied. Reported below: 861 F. 2d 263.

No. 88–1422. Wolfson *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 867 F. 2d 1425.

No. 88–1429. DeVoe *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 2d 1088.

No. 88–1442. Nally et ux. *v.* Grace Community Church of the Valley et al. Sup. Ct. Cal. Certiorari denied. Reported below: 47 Cal. 3d 278, 763 P. 2d 948.

No. 88–1443. Billhimer *v.* Maryland Administrative Board of Election Laws. Ct. App. Md. Certiorari denied. Reported below: 314 Md. 46, 548 A. 2d 819.

No. 88–1487. Rogers *v.* First National Bank of Peoria et al. C. A. 7th Cir. Certiorari denied. Reported below: 851 F. 2d 916.

No. 88–1489. WOLPERT ET UX., INDIVIDUALLY AND GUARDIANS OF WOLPERT ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 88–6204. BRANION *v.* GRAMLY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 855 F. 2d 1256.

No. 88–6211. STREATER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 862 F. 2d 311.

No. 88–6401. MARTIN *v.* COMMONWEALTH NATIONAL BANK ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 378 Pa. Super. 657, 544 A. 2d 1048.

No. 88–6457. SMITH *v.* FAIRMAN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 862 F. 2d 630.

No. 88–6511. WRIGHT *v.* BOGAN, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 1086.

No. 88–6520. POLING *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 515 N. E. 2d 1074.

No. 88–6527. ERICKSON *v.* ERICKSON, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 1086.

No. 88–6532. LARSON *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 759 S. W. 2d 457.

No. 88–6539. MALLOY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 88–6540. PRATT *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 104 Nev. 869.

No. 88–6541. HENSLEY *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 91 N. C. App. 282, 371 S. E. 2d 498.

No. 88–6543. YAGOW *v.* MELROE ET AL. C. A. 8th Cir. Certiorari denied.

No. 88–6547. LEONARD *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 171 Ill. App. 3d 380, 526 N. E. 2d 397.

No. 88–6548. WILSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 170 Ill. App. 3d 1159, 542 N. E. 2d 185.

No. 88–6549. Kuku *v.* Immigration and Naturalization Service. C. A. 5th Cir. Certiorari denied. Reported below: 856 F. 2d 190.

No. 88–6550. Shuster *v.* Martinez, Governor of Florida, et al. Sup. Ct. Fla. Certiorari denied. Reported below: 534 So. 2d 401.

No. 88–6553. Nollsch *v.* Wyoming. Sup. Ct. Wyo. Certiorari denied.

No. 88–6557. Marshall *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 377 Pa. Super. 653, 541 A. 2d 1152.

No. 88–6560. Henderson *v.* Greer, Warden, et al. C. A. 7th Cir. Certiorari denied. Reported below: 859 F. 2d 492.

No. 88–6564. Holguin *v.* Dorsey, Warden, et al. C. A. 10th Cir. Certiorari denied.

No. 88–6571. Hillman *v.* City of Spokane. Super. Ct. Wash., Spokane County. Certiorari denied.

No. 88–6575. Landes *v.* Yost, Commandant, United States Coast Guard. C. A. 3d Cir. Certiorari denied. Reported below: 869 F. 2d 590.

No. 88–6590. Weber *v.* State Bar of California. Sup. Ct. Cal. Certiorari denied. Reported below: 47 Cal. 3d 492, 764 P. 2d 701.

No. 88–6591. Woodfin *v.* Virginia. Sup. Ct. Va. Certiorari denied. Reported below: 236 Va. 89, 372 S. E. 2d 377.

No. 88–6592. Pennock *v.* Arthur F. Schultz Co. et al. C. A. 3d Cir. Certiorari denied. Reported below: 862 F. 2d 309.

No. 88–6593. Petrarca *v.* Picerne et al. C. A. 1st Cir. Certiorari denied.

No. 88–6594. Maghe *v.* Wallman, Warden. C. A. 10th Cir. Certiorari denied.

No. 88–6596. Wood *v.* Veterans Administration et al. C. A. 10th Cir. Certiorari denied.

No. 88–6599. Mason *v.* Parke, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 860 F. 2d 1079.

No. 88-6601. CLEM *v.* COUNTY OF SAN DIEGO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 857 F. 2d 1477.

No. 88-6606. MIZELL *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 88-6607. MCSHAN *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 88-6637. DAWN ET UX. *v.* RICHMOND ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 861 F. 2d 268.

No. 88-6643. JOHNS *v.* DEPARTMENT OF THE INTERIOR. C. A. Fed. Cir. Certiorari denied. Reported below: 868 F. 2d 1277.

No. 88-6648. MAZAK *v.* RISON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 88-6661. THORNBERG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 88-6663. HARRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 862 F. 2d 308.

No. 88-6672. DONALD *v.* GEORGIA. Ct. App. Ga. Certiorari denied.

No. 88-6679. FULLER *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 867 F. 2d 608.

No. 88-6681. MANNING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 867 F. 2d 1425.

No. 88-6703. BATIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 261.

No. 88-6705. SUGIYAMA *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 846 F. 2d 570.

No. 88-6707. BOGDEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 865 F. 2d 124.

No. 88-6708. VELASCO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 865 F. 2d 1272.

No. 88-6710. LAURENCO *v.* SULLIVAN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 867 F. 2d 609.

No. 88-6712. YARBOROUGH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 88–6715. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 869 F. 2d 1495.

No. 88–6724. AMYX *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied. Reported below: 55 Ohio App. 3d 54, 562 N. E. 2d 508.

No. 88–6727. COOKSLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 1446.

No. 88–6739. SUTTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 861 F. 2d 461.

No. 88–6741. HAILE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 1269.

No. 88–6757. LOVINGOOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 810 F. 2d 195.

No. 88–6775. BRAXTON, ADMINISTRATRIX AD PROSEQUENDUM OF THE ESTATE OF BRAXTON, AND ON BEHALF OF HERSELF *v.* BLANKS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 860 F. 2d 1074.

No. 88–6780. GOVAN *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 88–833. MARIANI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 851 F. 2d 595.

No. 88–1336. JIMINEZ ET AL. *v.* BP OIL, INC. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 853 F. 2d 268.

No. 88–1151. TAKAHASHI *v.* LIVINGSTON UNION SCHOOL DISTRICT ET AL. Ct. App. Cal., 5th App. Dist. Motion of Asian Pacific American Coalition for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 202 Cal. App. 3d 1464, 249 Cal. Rptr. 578.

No. 88–1157. MARTIN MARIETTA CORP. *v.* POLLARD; and

No. 88–1338. POLLARD *v.* MARTIN MARIETTA CORP. C. A. 4th Cir. Motions of American Corporate Counsel Association and American Bar Association for leave to file briefs as *amici curiae* in No. 88–1157 granted. Certiorari denied. Reported below: 856 F. 2d 619.

No. 88–1324. DUCKWORTH, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. *v.* DUDLEY. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 854 F. 2d 967.

No. 88–1345. RICKETTS ET AL. *v.* VAUGHAN ET AL. C. A. 9th Cir. Motion of respondents William John Cunningham and Bruce Foy Lowry for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 859 F. 2d 736.

No. 88–6093. HOOKS *v.* OHIO. Sup. Ct. Ohio;

No. 88–6318. ESPARZA *v.* OHIO. Sup. Ct. Ohio;

No. 88–6562. HANCE *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER AT JACKSON. Sup. Ct. Ga.;

No. 88–6577. MORRISON *v.* GEORGIA. Sup. Ct. Ga.; and

No. 88–6626. KARIS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: No. 88–6093, 39 Ohio St. 3d 67, 529 N. E. 2d 429; No. 88–6318, 39 Ohio St. 3d 8, 529 N. E. 2d 192; No. 88–6562, 258 Ga. 649, 373 S. E. 2d 184; No. 88–6577, 258 Ga. 683, 373 S. E. 2d 506; No. 88–6626, 46 Cal. 3d 612, 758 P. 2d 1189.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88–6438. KEENAN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 46 Cal. 3d 478, 758 P. 2d 1081.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case. But even if I did not hold this view, I would still grant the petition. The record in this case strongly suggests that, in the words of the dissenting judge below, "certain remarks by the court during the penalty phase, superimposed upon an emotional episode that had already occurred in the jury room, had an improperly coercive effect upon the jury's deliberations and improperly influenced the verdict." 46 Cal. 3d 478, 545, 758 P. 2d 1081, 1124 (1988) (Kaufman, J., dissenting in part). I would therefore grant certiorari, both to ascertain whether petitioner was denied his right to an uncoerced verdict, and to clarify our standards for determining jury coercion, a subject discussed most recently in *Lowenfield* v. *Phelps*, 484 U. S. 231 (1988).

The penalty phase in question was described at length in the majority and partially dissenting opinions below, 46 Cal. 3d, at 527–544, 758 P. 2d, at 1112–1124 (majority opinion); *id.*, at 545–550, 758 P. 2d, at 1124–1129 (Kaufman, J., dissenting in part), and so only a brief account is necessary here. During jury deliberations, only one juror held out: an elderly woman who refused to vote to impose the death penalty. After a day of deliberations, another juror rose out of his chair and verbally attacked her in a tirade that apparently included a death threat. *Id.*, at 545, 758 P. 2d, at 1125. Crying and shaking, she left the jury room and went to a bathroom, where she vomited. In response, the foreman sent the judge notes indicating that there was one holdout against imposing the death penalty. *Ibid.*

The judge then recalled the jury. He told the jury that the court was required to investigate the jury's "problem" by questioning the foreman and, perhaps, "'the one or more jurors who may be having difficulty in reaching a verdict.'" *Id.*, at 546, 758 P. 2d, at 1125. He added that, if necessary, he would determine whether or not "one or more of the jurors are refusing to adhere to the law and the evidence," *ibid.* (emphasis omitted); he added that he had expected that the jury would have delivered a verdict by then. *Id.*, at 546, 758 P. 2d, at 1126. The judge told the jurors that he was sending them home for the weekend so that they could search their consciences. He then recognized the foreman, who stated that the weekend release would be a "fine gesture," and that "we should have a verdict come Monday." *Ibid.* The judge responded: "Good. Well, I'm glad to hear you say that. I appreciate that." *Ibid.* After only one hour of deliberations Monday morning, the jurors voted unanimously to impose the death penalty.

In *Lowenfield,* the Court observed that "[a]ny criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body." 484 U. S., at 241. To determine if coercion has occurred, courts must "consider the supplemental charge given by the trial court 'in its context and under all the circumstances.'" *Id.*, at 237 (citation omitted). We held that the particular supplemental charges and jury polling at issue had not resulted in coercion, but that other instructions and comments might require a different conclusion. *Id.*, at 241.

In my view, this case presents a far more compelling circumstance for finding jury coercion than did *Lowenfield.* As the dissenting judge below observed, the holdout juror, given her emotional condition, the verbal attack upon her, and the judge's indication that he would have to investigate one or more jurors

> "may well have interpreted these statements as meaning the court *expected* a verdict on Monday and that it wanted *her personally* to resolve any lingering doubts she may have had about the appropriateness of imposing the death penalty. It is also highly likely [she] believed that, by agreeing to the death verdict on Monday, she could avoid the threatened investigation by the court and the attorneys of the jury room incident and of her reluctance to vote for death." 46 Cal. 3d, at 547–548, 758 P. 2d, at 1127.

The petitioner here was entitled to have the decision whether he "deserve[d] to live or die . . . made on scales that are not deliberately tipped toward death." *Witherspoon* v. *Illinois*, 391 U. S. 510, 521–522, n. 20 (1968). Because the actions of the trial judge in this case raise serious doubts about whether the context and circumstances of the death sentence in this case were coercive, and thus whether the scales of justice were in equipoise when the time for that decision came, I would grant the petition for review. I dissent.

Rehearing Denied

No. 87–764. FLORIDA *v.* RILEY, 488 U. S. 445;

No. 87–6031. ROMAN *v.* ABRAMS, ATTORNEY GENERAL OF NEW YORK, 489 U. S. 1052;

No. 88–894. REARDON ET AL. *v.* MILLER, JUDGE, SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, CAMDEN COUNTY, ET AL., 488 U. S. 1031;

No. 88–925. HARRIS ET AL. *v.* ISRAELITE BIBLE CLASS, INC., 489 U. S. 1013;

No. 88–936. SCHWARZ *v.* CITY OF WARWICK, RHODE ISLAND, ET AL., 489 U. S. 1013; and

No. 88–6167. FERDIK *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., 489 U. S. 1026. Petitions for rehearing denied.

No. 88–1050. APPLEGATE ET VIR *v.* CALIFORNIA ET AL., 489 U. S. 1017. Petition for rehearing and other relief denied.

APRIL 7, 1989

Miscellaneous Order

No. 88–493. UNIVERSITY OF PENNSYLVANIA *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 3d Cir. The order entered December 12, 1988 [488 U. S. 992], granting the petition for writ of certiorari is amended to read: "Certiorari granted limited to Question 1 presented by the petition." Case is removed from the calendar for argument on April 18, 1989, and will be argued during the October Term 1989.

APRIL 17, 1989

Appeals Dismissed

No. 88–1491. RHINEHART ET AL. *v.* SEATTLE TIMES ET AL. Appeal from Ct. App. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 51 Wash. App. 561, 754 P. 2d 1243.

No. 88–6255. SHAFFER *v.* DEPARTMENT OF SOCIAL SERVICES. Appeal from Ct. App. Mich. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 88–6630. BONNIE MARIE H., A MINOR *v.* HANNAN ET AL. Appeal from Ct. App. Cal., 6th App. Dist., dismissed for want of properly presented federal question.

Certiorari Granted—Vacated and Remanded

No. 88–1366. SIMMONS ET AL. *v.* PEREZ. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Canton* v. *Harris*, 489 U. S. 378 (1989). Reported below: 859 F. 2d 1411.

No. 88–1395. MUNICIPAL COURT OF THE SOUTHEAST JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, ET AL. *v.* GUTIERREZ. C. A. 9th Cir. Motion of U. S. English Foundation, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals with instructions to dismiss the appeal as moot. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Reported below: 838 F. 2d 1031.

Miscellaneous Orders. (See also Nos. 88–6494 and 88–6497, *ante*, p. 89.)

No. – –——. STEWART *v.* CORBIN ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–778 (88–6904). MCDONALD *v.* YELLOW CAB METRO, INC. Sup. Ct. Tenn. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–755. IN RE DISBARMENT OF MCKAY. Disbarment entered. [For earlier order herein, see 488 U. S. 1026.]

No. D–757. IN RE DISBARMENT OF SACCO. Disbarment entered. [For earlier order herein, see 488 U. S. 1026.]

No. D–763. IN RE DISBARMENT OF GRIDLEY. Disbarment entered. [For earlier order herein, see 488 U. S. 1038.]

No. D–765. IN RE DISBARMENT OF DOUGLAS. Disbarment entered. [For earlier order herein, see 488 U. S. 1039.]

No. D–776. IN RE DISBARMENT OF WERNER. It is ordered that Mark Eugene Werner II, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–777. IN RE DISBARMENT OF COOPER. It is ordered that Michael Cooper, of Arlington Heights, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–778. In re Disbarment of Shultz. It is ordered that H. Barry Shultz, of Old Bridge, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–779. In re Disbarment of Lampert. It is ordered that Irving B. Lampert, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–780. In re Disbarment of Hayes. It is ordered that Thomas Michael Hayes, Jr., of St. Louis, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–781. In re Disbarment of Black. It is ordered that Larry Thomas Black, of Telluride, Colo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 87–6997. Carella *v.* California. App. Dept., Super. Ct. Cal., Los Angeles County. [Probable jurisdiction noted, 488 U. S. 940 and 964.] Motion of American Rental Association for leave to file a brief as *amicus curiae* granted.

No. 88–124. Breininger *v.* Sheet Metal Workers International Association Local Union No. 6. C. A. 6th Cir. [Certiorari granted, 489 U. S. 1009.] Motion of Association for Union Democracy et al. for leave to file a brief as *amici curiae* granted.

No. 88–309. Wyoming *v.* United States et al. Sup. Ct. Wyo. [Certiorari granted, 488 U. S. 1040.] Motion of respondents Bradford Bath et al. for divided argument and for additional time for oral argument denied.

No. 88–429. Public Citizen *v.* United States Department of Justice et al.; and

No. 88–494. Washington Legal Foundation *v.* United States Department of Justice et al. D. C. D. C. [Probable jurisdiction noted, 488 U. S. 979.] Motion of People for the American Way Action Fund et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied. JUSTICE SCALIA took no part in the consideration or decision of this motion.

No. 88–605. WEBSTER, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* REPRODUCTIVE HEALTH SERVICES ET AL. C. A. 8th Cir. [Probable jurisdiction noted, 488 U. S. 1003.] Motion of Elizabeth Holtzman, District Attorney of Kings County, N. Y., for leave to join *amici curiae* brief of Massachusetts et al. granted.

No. 88–1031. CITIBANK, N. A. *v.* TRINH. C. A. 6th Cir.;
No. 88–1042. FERNANDEZ *v.* FERNANDEZ. Sup. Ct. Conn.;
No. 88–1260. CITIBANK, N. A. *v.* WELLS FARGO ASIA LTD. C. A. 2d Cir.; and
No. 88–6376. MONTERO *v.* MEYER ET AL. C. A. 10th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 88–6352. BURKART *v.* POST-BROWNING, INC. C. A. 6th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [489 U. S. 1064] or for leave to proceed as a veteran denied.

No. 88–1542. IN RE BARKSDALE;
No. 88–6718. IN RE GREEN; and
No. 88–6763. IN RE WALKER. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 88–1374. JIMMY SWAGGART MINISTRIES *v.* BOARD OF EQUALIZATION OF CALIFORNIA. Appeal from Ct. App. Cal., 4th App. Dist. Probable jurisdiction noted. Reported below: 204 Cal. App. 3d 1269, 250 Cal. Rptr. 891.

Certiorari Granted

No. 88–1000. NEW YORK *v.* HARRIS. Ct. App. N. Y. Certiorari granted. Reported below: 72 N. Y. 2d 614, 532 N. E. 2d 1229.

No. 88–1353. UNITED STATES *v.* VERDUGO-URQUIDEZ. C. A. 9th Cir. Certiorari granted. Reported below: 856 F. 2d 1214.

No. 88–1198. FEDERAL TRADE COMMISSION *v.* SUPERIOR COURT TRIAL LAWYERS ASSN.; and

No. 88–1393. SUPERIOR COURT TRIAL LAWYERS ASSN. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 272 U. S. App. D. C. 272, 856 F. 2d 226.

No. 88–1400. FRANCHISE TAX BOARD OF CALIFORNIA ET AL. *v.* ALCAN ALUMINIUM LTD. ET AL. C. A. 7th Cir. Motion of Multistate Tax Commission for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 860 F. 2d 688.

Certiorari Denied. (See also Nos. 88–1491 and 88–6255, *supra.*)

No. 87–1794. TSAO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 838 F. 2d 475.

No. 87–1927. KNOX ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 839 F. 2d 285.

No. 88–291. ZUKAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 843 F. 2d 179.

No. 88–868. BRINGLE ET UX. *v.* WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES ET AL. Ct. App. Wash. Certiorari denied. Reported below: 51 Wash. App. 1038.

No. 88–1069. REGALADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 857 F. 2d 789.

No. 88–1094. POINIER, AS TRANSFEREE OF HALBACH, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 858 F. 2d 917.

No. 88–1177. MUSTANG FUEL CORP., FKA MUSTANG ENERGY CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 859 F. 2d 1447.

No. 88–1191. VERGARA-VELEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 88-1210. RIVERA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 859 F. 2d 1204.

No. 88-1217. CITY OF FORT LAUDERDALE ET AL. *v.* A. A. PROFILES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 850 F. 2d 1483.

No. 88-1223. MASSACHUSETTS ET AL. *v.* UNITED STATES DEPARTMENT OF DEFENSE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 859 F. 2d 1066.

No. 88-1239. VIOLA *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 27 M. J. 456.

No. 88-1358. FUCHS ET AL. *v.* RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 858 F. 2d 1210.

No. 88-1360. UNITED STATES FIRE INSURANCE CO. *v.* FEDERAL INSURANCE CO. C. A. 2d Cir. Certiorari denied. Reported below: 858 F. 2d 882.

No. 88-1361. WALLS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 536 So. 2d 137.

No. 88-1362. MCCALL *v.* DUTTON, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 863 F. 2d 454.

No. 88-1363. NEYHARD, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF NEYHARD *v.* STATE FARM INSURANCE CO. Super. Ct. Pa. Certiorari denied. Reported below: 362 Pa. Super. 629, 520 A. 2d 68.

No. 88-1364. AVERETTE ET UX. *v.* TRIPLE CREEK CORP. Sup. Ct. Ga. Certiorari denied. Reported below: —— Ga. ——, 372 S. E. 2d 641.

No. 88-1365. FAUVER, COMMISSIONER, NEW JERSEY DEPARTMENT OF CORRECTIONS, ET AL. *v.* RYAN. C. A. 3d Cir. Certiorari denied. Reported below: 860 F. 2d 1199.

No. 88-1371. ELLIS ET AL. *v.* CONSOLIDATED DIESEL ELECTRIC CORP. ET AL. C. A. 10th Cir. Certiorari denied.

No. 88-1376. MUSTO ET AL. *v.* AMERICAN GENERAL CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 861 F. 2d 897.

No. 88–1384. TELUM, INC., ET AL. *v.* E. F. HUTTON CREDIT CORP. C. A. 10th Cir. Certiorari denied. Reported below: 859 F. 2d 835.

No. 88–1392. UGALDE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 188 Ga. App. 592, 373 S. E. 2d 643.

No. 88–1394. STANSEL ET AL. *v.* AMERICAN SECURITY BANK, N. A. Ct. App. D. C. Certiorari denied. Reported below: 547 A. 2d 990.

No. 88–1401. ANGEL ET UX. *v.* RENN. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 88–1402. FLAYAC *v.* HUMRICHOUSE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 2d 861.

No. 88–1406. INTRA CORP. ET AL. *v.* HAMAR LASER INSTRUMENTS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 862 F. 2d 320.

No. 88–1407. DOLENZ *v.* STUART YACHT BUILDERS, INC. C. A. 11th Cir. Certiorari denied.

No. 88–1409. WALENTAS *v.* LIPPER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 862 F. 2d 414.

No. 88–1411. BOYLE *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 88–1416. BARNTHOUSE *v.* BARNTHOUSE. Ct. App. Colo. Certiorari denied. Reported below: 765 P. 2d 610.

No. 88–1419. LAFFERTY *v.* ALYESKA PIPELINE SERVICE CO. ET AL. Sup. Ct. Alaska. Certiorari denied.

No. 88–1420. EREBIA *v.* CHRYSLER PLASTIC PRODUCTS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 863 F. 2d 47.

No. 88–1421. MONDOZZI *v.* AKRON BOARD OF EDUCATION. C. A. 6th Cir. Certiorari denied. Reported below: 863 F. 2d 49.

No. 88–1425. TOWNSHIP OF PLYMOUTH, PENNSYLVANIA *v.* COUNTY OF MONTGOMERY, PENNSYLVANIA. Pa. Commw. Ct. Certiorari denied. Reported below: 109 Pa. Commw. 200, 531 A. 2d 49.

No. 88–1430. Union Asphalts & Roadoils, Inc., et al. *v.* Mo-Kan Teamsters Pension Fund et al. C. A. 8th Cir. Certiorari denied. Reported below: 857 F. 2d 1230.

No. 88–1436. Fincher *v.* Finkbohner. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 536 So. 2d 257.

No. 88–1440. Gajkowski et al. *v.* Highway Truck Drivers & Helpers Local Union No. 107. Sup. Ct. Pa. Certiorari denied. Reported below: 519 Pa. 320, 548 A. 2d 533.

No. 88–1448. Salim *v.* District of Columbia. Ct. App. D. C. Certiorari denied.

No. 88–1452. Stich *v.* United States Bankruptcy Court et al. C. A. 9th Cir. Certiorari denied.

No. 88–1453. John E. Graham & Sons et al. *v.* Landry et ux. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 533 So. 2d 975.

No. 88–1459. Daigle *v.* Gulf States Utility Co. C. A. 5th Cir. Certiorari denied. Reported below: 860 F. 2d 436.

No. 88–1473. Bowline Construction Co. et al. *v.* Capco Pipe Co., Inc. Ct. App. Okla. Certiorari denied.

No. 88–1499. Johnson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 863 F. 2d 887.

No. 88–1502. Enochs *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 857 F. 2d 491.

No. 88–1509. Patton *v.* United States Railroad Retirement Board. C. A. 4th Cir. Certiorari denied. Reported below: 862 F. 2d 314.

No. 88–1511. Runnels, aka Davis, et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1423.

No. 88–1516. Montemarano *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 861 F. 2d 339.

No. 88–1538. Brennan *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 867 F. 2d 111.

No. 88–1540. Rhone *v.* Frank, Postmaster General. C. A. 6th Cir. Certiorari denied. Reported below: 861 F. 2d 721.

No. 88-1556. CALVO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 865 F. 2d 823.

No. 88-6100. VILLARRUBIA *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 857 F. 2d 1471.

No. 88-6177. GARDNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 860 F. 2d 1391.

No. 88-6265. CARLSON ET UX. *v.* COUNTY OF HENNEPIN, MINNESOTA, ET AL. Ct. App. Minn. Certiorari denied. Reported below: 428 N. W. 2d 453.

No. 88-6294. OLIVER ET UX. *v.* MERCHANTS & FARMERS BANK, MACON, MISSISSIPPI. C. A. 5th Cir. Certiorari denied.

No. 88-6305. WARTHEN *v.* BAKER ET AL. C. A. D. C. Cir. Certiorari denied.

No. 88-6306. WARTHEN *v.* DUNSMORE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 88-6333. PRESTON *v.* ODEA, WARDEN. Ct. App. Ky. Certiorari denied.

No. 88-6368. VU DOC GUONG *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 860 F. 2d 1063.

No. 88-6385. EVANS *v.* HATHAWAY, SHERIFF, CADDO PARISH, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 860 F. 2d 436.

No. 88-6387. GOODEN *v.* ROBERTS. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 1084.

No. 88-6394. RENGIFO, AKA CASTRO *v.* UNITED STATES;
No. 88-6443. GONZALEZ *v.* UNITED STATES; and
No. 88-6447. GONZALES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 858 F. 2d 800.

No. 88-6418. VAN LEEUWEN ET VIR *v.* MCCORKINDALE ET AL. C. A. 8th Cir. Certiorari denied.

No. 88-6435. DICKERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 857 F. 2d 414.

No. 88-6477. ESCOBALES *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 16 Conn. App. 272, 547 A. 2d 553.

No. 88-6481. NUTTELMAN *v.* STROMSBURG BANK ET AL. C. A. 8th Cir. Certiorari denied.

No. 88-6567. GANEY *v.* BARNETT, SUPERINTENDENT, EASTERN CORRECTIONAL INSTITUTION AT MAURY, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 862 F. 2d 869.

No. 88-6568. GANEY *v.* GARRISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 861 F. 2d 263.

No. 88-6570. CRUZ *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 861 F. 2d 1277.

No. 88-6572. ABNER *v.* ESCAMBIA COUNTY SCHOOL DISTRICT, PENSACOLA, FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 88-6578. MERKLE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 143 App. Div. 2d 145, 531 N. Y. S. 2d 601.

No. 88-6584. JACKSON *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 88-6586. HICKS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 88-6600. HAY *v.* MCCOTTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 862 F. 2d 873.

No. 88-6603. SCOTT *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 229 Neb. xxvii.

No. 88-6604. HUMPHREY *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 861 F. 2d 875.

No. 88-6605. CAMPBELL *v.* WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION. Ct. App. Wis. Certiorari denied.

No. 88-6610. HOLT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 88-6614. HUSS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 430 N. W. 2d 621.

No. 88-6617. BURLEY *v.* FORD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 793.

No. 88-6619. RIGHTER *v.* UNITED STATES STOVE CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 856 F. 2d 184.

No. 88-6620. YOUNG *v.* PATTERSON. C. A. 2d Cir. Certiorari denied. Reported below: 867 F. 2d 1425.

No. 88-6621. ROBINSON *v.* BOARD OF BAR OVERSEERS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 867 F. 2d 606.

No. 88-6622. MUHAMMAD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 88-6628. CLARK *v.* WHARTON, SUPERINTENDENT, MEN'S CORRECTIONAL INSTITUTION AT HARDWICK, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 861 F. 2d 726.

No. 88-6629. WARREN *v.* NAGLE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1422.

No. 88-6653. TODD *v.* DEMPSEY, ACTING EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied.

No. 88-6657. DUVALL *v.* TEXAS WATER COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 853 F. 2d 924.

No. 88-6659. READ *v.* TAYLOR ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 252.

No. 88-6662. ARMSTRONG *v.* KINCHELOE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 1289.

No. 88-6664. JARVI *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 837 F. 2d 475.

No. 88-6668. LANCE *v.* SOUTH CAROLINA HIGHWAY PATROLMEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 861 F. 2d 714.

No. 88-6669. SELLNER *v.* HUDNALL ET AL. C. A. 11th Cir. Certiorari denied.

No. 88-6670. SIERS *v.* FREEMAN, SUPERINTENDENT, STATE CORRECTION INSTITUTION (AND DIAGNOSTIC AND CLASSIFICA-

TION CENTER) AT CAMP HILL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 773 F. 2d 37.

No. 88–6671. BONDS *v.* SHILLINGER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–6673. COLEMAN *v.* DEPARTMENT OF AGRICULTURE ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–6674. ALLAH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 140 App. Div. 2d 613, 529 N. Y. S. 2d 5.

No. 88–6680. FUNKHOUSER *v.* MULLINS. C. A. 8th Cir. Certiorari denied.

No. 88–6685. IVES *v.* KELLEY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 867 F. 2d 1423.

No. 88–6686. SCOTT *v.* DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 88–6687. STEELEY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 533 So. 2d 665.

No. 88–6688. BROWN *v.* HOKE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY AT NAPANOCH, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 872 F. 2d 1021.

No. 88–6689. BARKER *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 88–6690. YORK *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 856 F. 2d 61.

No. 88–6691. MORRIS *v.* CHITWOOD. Sup. Ct. Tex. Certiorari denied.

No. 88–6692. OVERSTREET *v.* TRICKEY, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 88–6695. SHERRILLS *v.* GRAY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 867 F. 2d 611.

No. 88-6696. Tyler et al. *v.* Black et al. C. A. 8th Cir. Certiorari denied. Reported below: 865 F. 2d 181.

No. 88-6697. Leal *v.* Coronado. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 88-6698. Brown *v.* Missouri Department of Corrections and Human Resources et al. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 1087.

No. 88-6701. Lucas *v.* Arizona. Sup. Ct. Ariz. Certiorari denied.

No. 88-6702. Cunningham et ux. *v.* Cuyahoga Department of Human Services. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 88-6706. Johnson *v.* District Court of Wyoming, First Judicial District. Sup. Ct. Wyo. Certiorari denied.

No. 88-6722. Everhart *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 2d 265.

No. 88-6731. Morgan *v.* Sullivan, Warden, et al. C. A. 8th Cir. Certiorari denied. Reported below: 856 F. 2d 1188.

No. 88-6745. Brawner-El *v.* Zimmerman, Superintendent, State Correctional Institution at Graterford, Pennsylvania, et al. C. A. 3d Cir. Certiorari denied. Reported below: 866 F. 2d 1409.

No. 88-6746. Lawrence *v.* United States Railroad Retirement Board. C. A. D. C. Cir. Certiorari denied.

No. 88-6753. Olan *v.* Rodriguez, Chairman, New York Board of Parole. C. A. 2d Cir. Certiorari denied.

No. 88-6766. Daley *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 865 F. 2d 485.

No. 88-6767. Pollack *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 846 F. 2d 1383.

No. 88-6768. Jorge *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 865 F. 2d 6.

No. 88-6774. Horton *v.* Whitworth, State Attorney. C. A. 11th Cir. Certiorari denied.

No. 88–6790. FRANKLIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 1260.

No. 88–6795. SUAREZ ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 872 F. 2d 1022.

No. 88–6797. MANGA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 867 F. 2d 1429.

No. 88–6800. ADAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 262.

No. 88–6805. CLAYTON *v.* CRIST, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 2d 1088.

No. 88–6814. MCINTOSH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 88–6835. ROAN EAGLE, AKA BLINDMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 867 F. 2d 436.

No. 88–6836. CHAMBERS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 792.

No. 88–6908. CHANEY *v.* ROLLINS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 866 F. 2d 1415.

No. 87–6338. MOORE *v.* ZANT, WARDEN. C. A. 11th Cir.;
No. 87–7052. FLEMING *v.* ZANT, WARDEN. C. A. 11th Cir.;
No. 88–6038. SIMON *v.* TENNESSEE. Ct. Crim. App. Tenn.;
No. 88–6349. BENNETT *v.* VIRGINIA. Sup. Ct. Va.;
No. 88–6496. BRYAN *v.* FLORIDA. Sup. Ct. Fla.;
No. 88–6624. FISHER *v.* VIRGINIA. Sup. Ct. Va.;
No. 88–6656. SOWELL *v.* OHIO. Sup. Ct. Ohio;
No. 88–6665. DAVIS *v.* ALABAMA. Sup. Ct. Ala.;
No. 88–6667. GREER *v.* OHIO. Sup. Ct. Ohio; and
No. 88–6675. WOODWARD *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: No. 87–6338, 824 F. 2d 847; No. 87–7052, 837 F. 2d 940; No. 88–6349, 236 Va. 448, 374 S. E. 2d 303; No. 88–6496, 533 So. 2d 744; No. 88–6624, 236 Va. 403, 374 S. E. 2d 46; No. 88–6656, 39 Ohio St. 3d 322, 530 N. E. 2d 1294; No. 88–6665, 536 So. 2d 118; No. 88–6667,

39 Ohio St. 3d 236, 530 N. E. 2d 382; No. 88–6675, 533 So. 2d 418.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88–415. PUEBLO OF ACOMA *v.* PADILLA. Sup. Ct. N. M. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 107 N. M. 174, 754 P. 2d 845.

JUSTICE WHITE, dissenting.

Respondent Frank Padilla, a roofing consultant, filed suit in New Mexico state court alleging a breach of contract by petitioner Pueblo of Acoma, doing business as Sky City Contractors. Petitioner had hired respondent to supervise Sky City's installation of roofs on two building projects located off the Acoma Indian Reservation. The New Mexico Supreme Court held that petitioner was not protected from suit by tribal sovereign immunity. 107 N. M. 174, 754 P. 2d 845 (1988). According to the New Mexico court, a State's "exercise of jurisdiction over a sovereign Indian tribe for off-reservation conduct is solely a matter of comity." *Id.*, at 179, 754 P. 2d, at 850 (citing *Nevada* v. *Hall*, 440 U. S. 410 (1979)). Because the State of New Mexico allows breach of contract actions to be brought against itself, the court reasoned, such actions were allowable against Indian tribes as well.

This decision conflicts with decisions of the Arizona courts applying tribal sovereign immunity to off-reservation activities. In *Morgan* v. *Colorado River Indian Tribe*, 103 Ariz. 425, 427–428, 443 P. 2d 421, 423–424 (1968), the Arizona Supreme Court held that the Colorado River Indian Tribe was immune from suit for an accident at the Blue Water Marina Park, a tribal enterprise located outside the boundaries of its reservation. The court did not treat the question as one of comity; indeed, the court noted that under identical circumstances the State of Arizona would be liable. *Id.*, at 428, n. 1, 443 P. 2d, at 424, n. 1. See also *S. Unique, Ltd.* v. *Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 380–381, 674 P. 2d 1376, 1378–1379 (App. 1983) (breach of contract action arising out of business transaction initiated off reservation). The doctrine of tribal sovereign immunity, as applied by the Arizona courts, extends not only to an Indian tribe but also to a "subordinate economic organization" of the tribe. *White Mountain Apache Indian Tribe* v. *Shelley*, 107 Ariz. 4, 6–7, 480 P. 2d 654, 656–657 (1971); *Smith Plumbing Co.* v. *Aetna Casualty & Surety Co.*, 149 Ariz. 524, 532, 720 P. 2d 499, 507, cert. denied, 479 U. S. 987 (1986). The New Mexico Supreme Court expressly recognized that Sky City Contractors was a subordinate economic organization of petitioner, 107 N. M., at 178, 754 P. 2d, at 849 (citing *White Mountain Apache*, *supra*), yet nevertheless held that it was not immune from suit.

An opportunity to resolve this conflict was presented by our grant of certiorari in *Oklahoma Tax Comm'n* v. *Graham*, 488 U. S. 816 (1988), although we ultimately decided the case on other grounds. In that case, two questions were before us: whether the case had been properly removed to federal court and whether tribal sovereign immunity barred an action to collect taxes "on commercial activities conducted by an Indian tribe on off-reservation lands." We held that the case had not been properly removed, *Oklahoma Tax Comm'n* v. *Graham*, 489 U. S. 838 (1989) *(per curiam)*, and as a result did not need to reach the sovereign immunity question. The present case provides an opportunity to resolve the issue we did not reach in *Graham* and thereby to resolve the conflict among the state courts.

I would grant the petition for certiorari and resolve the question on which we previously granted certiorari but did not decide.

No. 88–535. LOCAL FREIGHT DRIVERS, LOCAL 208, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* ROZAY'S TRANSFER. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 850 F. 2d 1321.

No. 88–992. DALLAS COUNTY COMMISSION ET AL. *v.* UNITED STATES (two cases). C. A. 11th Cir. Motion of Samson Crum et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 850 F. 2d 1430 (first case); 850 F. 2d 1433 (second case).

No. 88–1053. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 858 F. 2d 876.

No. 88–1056. PENNSYLVANIA *v.* WAGGONER. Super. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 373 Pa. Super. 23, 540 A. 2d 280.

No. 88–1147. OKLAHOMA *v.* BROOKS, AKA AMENSHI, ET AL. Ct. Crim. App. Okla. Motion of Muscogee (Creek) Nation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 763 P. 2d 707.

No. 88–1347. GREEN *v.* FOLEY. C. A. 4th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 856 F. 2d 660.

No. 88–1378. MCNEIL ET AL. *v.* SPRINGFIELD PARK DISTRICT. C. A. 7th Cir. Motion of Mexican American Legal Defense and Educational Fund et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 851 F. 2d 937.

No. 88–1414. CALIFORNIA *v.* PARWEZ. Ct. App. Cal., 2d App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 88–6189. RICKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would grant certiorari. Reported below: 842 F. 2d 300.

Rehearing Denied

No. 87–121. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* ADAMS, 489 U. S. 401;

No. 87–889. COMPOY, WARDEN *v.* TURNER, 489 U. S. 1059;

No. 87–5259. TEAGUE *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL., 489 U. S. 288;

No. 87–5617. LINDSEY *v.* SMITH, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL., 489 U. S. 1059;

No. 88–875. TAYLOR *v.* TAYLOR, 489 U. S. 1012;

No. 88–895. STANTON *v.* DISTRICT OF COLUMBIA COURT OF APPEALS, 489 U. S. 1001;

No. 88–947. HARRISON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 489 U. S. 1053;

No. 88–1115. WILMOTH *v.* VIRGINIA, 489 U. S. 1053;

No. 88–1127. UBEROI *v.* UNIVERSITY OF COLORADO ET AL. 489 U. S. 1019;

No. 88–1134. SMITH *v.* COMBUSTION ENGINEERING, INC., ET AL., 489 U. S. 1054;

No. 88–5687. EDWARDS *v.* BLACK, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL., 489 U. S. 1059;

No. 88–5802. HAWLEY ET AL. *v.* UNITED STATES, 489 U. S. 1020;

No. 88–5944. SUN *v.* UNITED STATES, 489 U. S. 1022;

No. 88–6040. MCCABE *v.* DIAS ET AL., 488 U. S. 1036;

No. 88–6054. TEAGLER *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 489 U. S. 1022;

No. 88–6059. DEPEW *v.* OHIO, 489 U. S. 1042;

No. 88–6067. GREEN *v.* UNITED STATES, 489 U. S. 1023;

No. 88–6079. JONES *v.* ILLINOIS, 489 U. S. 1040;

No. 88–6116. SCHULTZ ET UX. *v.* SWANHORST ET AL., 489 U. S. 1024;

No. 88–6227. IN RE THEODOROPOULOS, 489 U. S. 1009;

No. 88–6235. GILES *v.* GARWOOD ET AL., 489 U. S. 1030;

No. 88–6249. LOWE *v.* KING ET AL., 489 U. S. 1030;

No. 88–6266. OLIVE *v.* SEARS, ROEBUCK & CO., 489 U. S. 1031; and

No. 88–6325. BROWN *v.* OHIO, 489 U. S. 1040. Petitions for rehearing denied.

APRIL 24, 1989

Dismissal Under Rule 53

No. 88–1478. CORPUS CHRISTI TAXPAYERS ASSN. ET AL. *v.* CITY OF CORPUS CHRISTI, TEXAS, ET AL. C. A. 5th Cir. Certiorari dismissed as to petitioner Tom Hunt under this Court's Rule 53. Reported below: 858 F. 2d 973.

Appeal Dismissed

No. 88–980. ECKLES, DBA RIVERVIEW MARINA *v.* OREGON ET AL. Appeal from Sup. Ct. Ore. dismissed for want of substantial federal question. Reported below: 306 Ore. 380, 760 P. 2d 846.

Certiorari Granted—Vacated and Remanded

No. 87–750. PAN AMERICAN WORLD AIRWAYS, INC. *v.* PAMPIN LOPEZ, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF

LOPEZ DE PAMPIN, ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Chan* v. *Korean Air Lines, Ltd.*, *ante*, p. 122. Reported below: 821 F. 2d 1147.

No. 88-6056. PEREZ *v.* JONES, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harris* v. *Reed*, 489 U. S. 255 (1989).

Miscellaneous Orders

No. 74, Orig. GEORGIA *v.* SOUTH CAROLINA. Second and Final Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Reply briefs to such Exceptions may be filed within 30 days. [For earlier order herein, see, *e. g.*, 475 U. S. 1115.]

No. 88-309. WYOMING *v.* UNITED STATES ET AL. Sup. Ct. Wyo. [Certiorari granted, 488 U. S. 1040.] Motion of respondents Shoshone Tribe and Northern Arapaho Tribe to strike brief of respondents Bradford Bath et al. denied.

No. 88-1480. REVES ET AL. *v.* ARTHUR YOUNG & CO. C. A. 8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 88-6732. LASHLEY ET UX. *v.* FIRST NATIONAL BANK OF LIVE OAK. C. A. 11th Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 15, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

Certiorari Granted

No. 88-1319. COMMISSIONER OF INTERNAL REVENUE *v.* INDIANAPOLIS POWER & LIGHT CO. C. A. 7th Cir. Certiorari granted. Reported below: 857 F. 2d 1162.

No. 88-1076. PRESEAULT ET UX. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 2d Cir. Motions of Pacific Legal Foundation and National Association of Reversionary Property Owners for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 853 F. 2d 145.

No. 88-1150. MISSOURI ET AL. *v.* JENKINS ET AL. C. A. 8th Cir. Motion of National Taxpayers Union et al. for leave to file a brief as *amici curiae* granted. Certiorari granted limited to Question 2 presented by the petition. The parties are directed to brief also whether the petition for writ of certiorari is timely filed. Reported below: 855 F. 2d 1295.

No. 88-1264. SAFFLE, WARDEN, ET AL. *v.* PARKS. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 860 F. 2d 1545.

No. 88-6546. DURO *v.* REINA, CHIEF OF POLICE, SALT RIVER DEPARTMENT OF PUBLIC SAFETY, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 851 F. 2d 1136.

Certiorari Denied

No. 88-240. GAF CORP. *v.* ERICH ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 110 N. J. 230, 540 A. 2d 518.

No. 88-963. CULBERSON *v.* VETERANS ADMINISTRATION. C. A. 6th Cir. Certiorari denied. Reported below: 849 F. 2d 1472.

No. 88-1088. ROGERS ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 861 F. 2d 729.

No. 88-1146. NADER ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 859 F. 2d 747.

No. 88-1194. CLARK ET AL. *v.* JENKINS, BY HER FRIEND, AGYEI, ET AL.; and

No. 88-1228. JACKSON COUNTY, MISSOURI, ET AL. *v.* JENKINS, BY HER FRIEND, AGYEI, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 1295.

No. 88-1200. LAMPERT ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 854 F. 2d 335.

No. 88–1252. GURARY ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 860 F. 2d 521.

No. 88–1255. AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS ET AL. *v.* LOVE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 858 F. 2d 1347.

No. 88–1284. CARPENTERS LOCAL 608, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied.

No. 88–1295. TEXAS EMPLOYERS' INSURANCE ASSN. *v.* JACKSON. C. A. 5th Cir. Certiorari denied. Reported below: 862 F. 2d 491.

No. 88–1304. UNION CARBIDE CORP. *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (VILLMAR DENTAL LABS, INC., ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88–1305. ASHLEY TRANSFER & STORAGE CO., INC., ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 858 F. 2d 221.

No. 88–1354. EATON CORP. *v.* PKL COS., INC. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 88–1431. MARCOS ET AL. *v.* REPUBLIC OF THE PHILIPPINES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 2d 1355.

No. 88–1435. CHANDLER'S COVE INN, LTD. *v.* CEDAR TIDE CORP. C. A. 2d Cir. Certiorari denied. Reported below: 859 F. 2d 1127.

No. 88–1437. THOMAS *v.* BOARD OF EXAMINERS, CHICAGO PUBLIC SCHOOLS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 866 F. 2d 225.

No. 88–1438. SCHWARTZ, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF SCHWARTZ, ET AL. *v.* JOHN DEERE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 860 F. 2d 435.

No. 88-1441. FLEMING *v.* LEVY ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 88-1444. GOLIN *v.* FMC CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 250.

No. 88-1460. GROHS *v.* GOLD BOND BUILDING PRODUCTS. C. A. 7th Cir. Certiorari denied. Reported below: 859 F. 2d 1283.

No. 88-1485. H. C. ELLIOTT, INC. *v.* CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 859 F. 2d 808.

No. 88-1492. CRAWFORD *v.* CITY OF MACON, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 794.

No. 88-1498. BOX OFFICE, INC., ET AL. *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 88-1508. ROSS *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 255.

No. 88-1519. BERGMAN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 865 F. 2d 268.

No. 88-1537. MORTENSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 2d 948.

No. 88-1561. DI BELLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 863 F. 2d 45.

No. 88-1563. QUARLES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 853 F. 2d 492.

No. 88-1585. SMITH ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 838 F. 2d 436.

No. 88-6080. ANDERSON *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 169 Ill. App. 3d 289, 523 N. E. 2d 1034.

No. 88-6117. RAMIREZ-SAUSEDO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 861 F. 2d 725.

No. 88-6155. CURRY *v.* BLANKINSHIP. C. A. 5th Cir. Certiorari denied.

No. 88–6356. NUCCIO *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 860 F. 2d 435.

No. 88–6405. MELLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 863 F. 2d 888.

No. 88–6482. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 253.

No. 88–6574. CRANDALL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 46 Cal. 3d 833, 760 P. 2d 423.

No. 88–6579. SCULL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 533 So. 2d 1137.

No. 88–6678. BONANNO *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88–6700. CURRY *v.* BLANNOCK. C. A. 4th Cir. Certiorari denied. Reported below: 867 F. 2d 608.

No. 88–6713. BIRDO *v.* MCCOTTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 865 F. 2d 1264.

No. 88–6714. HICKS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 537 So. 2d 573.

No. 88–6717. MCNEILL *v.* ARIZONA PUBLIC SERVICE CO. Ct. App. Ariz. Certiorari denied.

No. 88–6720. SILLS *v.* TERRY, ATTORNEY GENERAL OF VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 255.

No. 88–6726. ASBERRY *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 860 F. 2d 1078.

No. 88–6730. HUNTER *v.* SAVAGE, RECORDS MANAGER, SOUTHERN NEW MEXICO CORRECTIONAL FACILITY. Dist. Ct. N. M., 3d Jud. Dist. Certiorari denied.

No. 88–6733. AMAN *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 793.

No. 88–6734. ADAMO *v.* HOTEL, MOTEL, BARTENDERS, COOKS & RESTAURANT WORKERS UNION LOCAL 24 ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 861 F. 2d 719.

No. 88–6735. CASEY *v.* MILES, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY AT ELMIRA, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 868 F. 2d 1267.

No. 88–6738. KARRIEM *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 88–6743. LYNCH *v.* ALBERTSON FOOD CENTERS, INC., ET AL. Ct. App. Ore. Certiorari denied. Reported below: 98 Ore. App. 216, 762 P. 2d 1069.

No. 88–6744. CLARK ET AL. *v.* BORG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 2d 318.

No. 88–6747. DIGGS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 531 N. E. 2d 461.

No. 88–6748. DAVIS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 88–6750. RICHARDS *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 88–6752. SCHULER *v.* SHILLINGER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–6754. SIMMONS *v.* BESSINGER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 255.

No. 88–6759. COPAS ET UX. *v.* CABINET FOR HUMAN RESOURCES ET AL. Ct. App. Ky. Certiorari denied.

No. 88–6786. CASTILLO-SICAIROS *v.* UNITED STATES PAROLE COMMISSION. C. A. 8th Cir. Certiorari denied. Reported below: 866 F. 2d 262.

No. 88–6793. WOJTOWICZ *v.* WARNER BROTHERS, INC. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 88–6817. TABACHNIK *v.* MURPHY ET AL. C. A. 2d Cir. Certiorari denied.

No. 88–6819. BROWN, AKA ALI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 859 F. 2d 150.

No. 88–6832. SERRANO *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 88–6840. BALDWIN *v.* SEABOLD, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 256.

No. 88–6853. ALASAD *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 88–6858. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 863 F. 2d 888.

No. 88–6866. MILNES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 88–1159. ARIZONA *v.* BRAVO. Sup. Ct. Ariz. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 158 Ariz. 364, 762 P. 2d 1318.

No. 88–1249. SOUTHERN BELL TELEPHONE & TELEGRAPH CO. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 88–1250. NEW ENGLAND TELEPHONE & TELEGRAPH CO. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Motion of Communications Satellite Corp. for leave to file a reply as *amicus curiae* granted. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and these petitions. Reported below: 264 U. S. App. D. C. 85, 826 F. 2d 1101.

No. 88–1302. BOHATCH ET VIR *v.* DELHAES ET AL. Ct. App. Ohio, Lake County. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 88–1321. NAVISTAR INTERNATIONAL TRANSPORTATION CORP. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 858 F. 2d 282.

No. 88–1427. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS PENSION PLAN ET AL. *v.* MEAGHER. C. A. 9th Cir. Motions of American Society of Pension Actuaries, American Society for Personnel Administration, Chamber of Commerce of the United States of America, and American Academy of Actuaries of the United States for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 856 F. 2d 1418.

No. 88-1447. WARD PETROLEUM CORP. ET AL. *v.* LOUISIANA LAND & EXPLORATION CO., SUCCESSOR BY MERGER AND ACQUISITION TO INEXCO OIL CO., ET AL. Sup. Ct. Okla. Motion of National Association of Royalty Owners et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 767 P. 2d 404.

No. 88-1450. DURA-CORP. *v.* RISI STONE LTD. ET AL. C. A. 3d Cir. Motion of respondents for attorney's fees and expenses denied. Certiorari denied. Reported below: 866 F. 2d 1409.

No. 88-6448. BARON, AKA SONIDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 860 F. 2d 911.

No. 88-6728. CARO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 46 Cal. 3d 1035, 761 P. 2d 680.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 88-6848. LAWS *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 863 F. 2d 1377.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case.

Even if I did not hold this view, I would still grant the petition and vacate petitioner's death sentence, so that we might address petitioner's claim that he was denied effective assistance of counsel at the penalty phase of his trial. After an extended hearing, the District Court granted petitioner's writ of habeas corpus, ruling that petitioner had not received effective assistance of counsel, and a panel of the Court of Appeals for the Eighth Circuit affirmed. The panel's judgment, however, was overturned by the Court of Appeals sitting en banc, over a strong dissenting opinion which three judges joined. 863 F. 2d 1377, 1394 (1988) (McMillian, J., dissenting, joined by Lay, C. J., and Heaney and Arnold, JJ.).

In my view, the behavior of petitioner's attorney at the penalty phase was plainly deficient, depriving his client of "the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984). The attorney offered literally no evidence in mitigation. This inaction cannot be explained by a dearth of potentially mitigating evidence. On the contrary, the attorney knew of, but failed to investigate, a number of facts about petitioner on which quite credible arguments in mitigation could have been made. Petitioner told his attorney, for example, that he had fought for this country in Vietnam and received an honorable discharge from the Army. 863 F. 2d, at 1396 (dissenting opinion). The attorney, however, failed to pursue this claim. Had he done so, he would have learned that petitioner had earned the National Defense Service Medal, the Vietnam Service Medal, the Vietnam Campaign Medal, and the Good Conduct Medal. *Id.*, at 1397.

The attorney also knew that many of the soldiers who served in the Vietnam conflict suffered severe emotional trauma afterwards, encountering problems of socialization and readjustment. In some cases, they have suffered from posttraumatic stress disorder so severe as to induce violent criminality, a fact recognized by Congress when it passed the Veterans Health Care Amendments of 1979, 38 U. S. C. §612 *et seq.* 863 F. 2d, at 1396–1397. The attorney failed, too, to explore this potential source of mitigating evidence, deciding after a sketchy telephone conversation with petitioner's stepmother and after a brief conversation with his brother not to interview the family. *Id.*, at 1395–1396. Had he done so, he would have learned that after his experience in Vietnam, petitioner "changed from a church-going young man who had never had any trouble with the law to a nervous and withdrawn loner constantly in trouble, in and out of prison." *Id.*, at 1397. The attorney also failed to explore petitioner's postdischarge psychiatric records, documents which would have provided "even more evidence of [petitioner's] personality change after his military service in Vietnam." *Ibid.*

It is questionable, to say the least, whether under these facts counsel's performance was indeed reasonable so as to satisfy the first prong of the two-pronged test for ineffective assistance set forth in *Strickland.* This conclusion is especially doubtful given that this is a capital case, posing the heaviest professional responsibility on counsel. Yet that is precisely what the en banc Court of Appeals held in this case. 863 F. 2d, at 1394. In my view, the decision below calls into question whether the *Strickland* test is to have any vitality at all. To establish that there are minimal thresholds below which counsel cannot go, I would grant the petition for certiorari.

Rehearing Denied

No. 88-1101. MADISON *v.* DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION, 489 U. S. 1053;
No. 88-5169. SPISAK *v.* OHIO, 489 U. S. 1071;
No. 88-5750. CLARK *v.* OHIO, 489 U. S. 1071;
No. 88-5990. ROBINSON *v.* UNITED STATES DEPARTMENT OF EDUCATION, 489 U. S. 1048;
No. 88-6242. ROBINSON *v.* ENGLISH DEPARTMENT OF THE UNIVERSITY OF PENNSYLVANIA ET AL., 489 U. S. 1048;
No. 88-6005. STEWART *v.* ILLINOIS, 489 U. S. 1072;
No. 88-6009. CRAWFORD *v.* GEORGIA, 489 U. S. 1040;
No. 88-6078. BRITZ *v.* ILLINOIS, 489 U. S. 1044;
No. 88-6224. HENDERSON *v.* OHIO, 489 U. S. 1072;
No. 88-6292. DAVIS-EL *v.* ROBINSON, 489 U. S. 1057;
No. 88-6320. BROWN *v.* VIRGINIA, 489 U. S. 1069;
No. 88-6321. BROWN *v.* VIRGINIA, 489 U. S. 1069;
No. 88-6392. MARTIN *v.* PENNSYLVANIA, 489 U. S. 1085; and
No. 88-6451. ENTELISANO *v.* FELT, 489 U. S. 1070. Petitions for rehearing denied.

No. 88-489. MCKABNEY ET UX. *v.* UNITED STATES, 488 U. S. 993. Petition for rehearing denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

No. 88-5700. ROSBERG *v.* JACOB ET AL., 488 U. S. 984; and
No. 88-6178. HERNANDEZ *v.* UNITED STATES, 489 U. S. 1027. Motions for leave to file petitions for rehearing denied.

APRIL 25, 1989

Miscellaneous Orders. (For the Court's orders prescribing an amendment to the Bankruptcy Rules, see *post*, p. 1121; amendments to the Federal Rules of Appellate Procedure, see *post*, p. 1127; and amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1137.)

MAY 1, 1989

Appeal Dismissed

No. 88–773. RODEY, DICKASON, SLOAN, AKIN & ROBB, P. A. *v.* REVENUE DIVISION OF THE DEPARTMENT OF TAXATION AND REVENUE OF NEW MEXICO. Appeal from Sup. Ct. N. M. dismissed for want of substantial federal question. Reported below: 107 N. M. 399, 759 P. 2d 186.

Certiorari Granted—Vacated and Remanded

No. 88–1290. BENJAMIN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Midland Asphalt Corp.* v. *United States*, 489 U. S. 794 (1989). Reported below: 852 F. 2d 413.

Miscellaneous Orders

No. — — ——. KAESTEL *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. JUSTICE BLACKMUN dissents.

No. — — ——. THOMPSON *v.* SCHROEDER ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–815 (88–7008). JAMES *v.* CARLSON, WARDEN. C. A. 9th Cir. Application for release, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D–742. IN RE DISBARMENT OF FREDERICK. Disbarment entered. [For earlier order herein, see 488 U. S. 963.]

No. D–769. IN RE DISBARMENT OF SMITH. Disbarment entered. [For earlier order herein, see 489 U. S. 1004.]

No. D–770. IN RE DISBARMENT OF MATTHEWS. Disbarment entered. [For earlier order herein, see 489 U. S. 1004.]

No. D–771. IN RE DISBARMENT OF BIAGGI. Disbarment entered. [For earlier order herein, see 489 U. S. 1049.]

No. D–782. IN RE DISBARMENT OF RICKS. It is ordered that Everett Emett Ricks, Jr., of Long Beach, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–783. IN RE DISBARMENT OF PAIGE. It is ordered that Richard R. Paige, of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–784. IN RE DISBARMENT OF LILLBACK. It is ordered that Larry G. Lillback, of Mentor, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for approval of fees and expenses granted, and the River Master is awarded $7,168.53 for the period January 1 through March 31, 1989, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 489 U. S. 1005.]

No. 87–1979. CHESAPEAKE & OHIO RAILWAY CO. *v.* SCHWALB ET AL.; and

No. 88–127. NORFOLK & WESTERN RAILWAY CO. *v.* GOODE. Sup. Ct. Va. [Certiorari granted, 489 U. S. 1009.] Motion of Association of American Railroads et al. for leave to file a brief as *amici curiae* granted.

No. 88–124. BREININGER *v.* SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 6. C. A. 6th Cir. [Certiorari granted, 489 U. S. 1009.] Motion of National Right to Work Legal Defense Foundation for leave to file a brief as *amicus curiae* granted.

No. 88–449. HEALY ET AL. *v.* THE BEER INSTITUTE ET AL.; and

No. 88–513. WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC. *v.* THE BEER INSTITUTE ET AL. C. A. 2d Cir. [Probable jurisdiction noted, 488 U. S. 954.] Motion of appellants John

F. Healy et al. for leave to file a supplemental brief after argument granted.

No. 88–764. JONES *v.* PREUIT & MAULDIN ET AL., 489 U. S. 1002. Motion of respondents to vacate taxing of costs denied. JUSTICE BLACKMUN would grant this motion.

No. 88–1213. EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON, ET AL. *v.* SMITH ET AL. Sup. Ct. Ore. [Certiorari granted, 489 U. S. 1077.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 88–6589. IN RE MADDEN; and
No. 88–6827. IN RE WALKER. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 88–1569. AUSTIN, MICHIGAN SECRETARY OF STATE, ET AL. *v.* MICHIGAN STATE CHAMBER OF COMMERCE. Appeal from C. A. 6th Cir. Probable jurisdiction noted. Reported below: 856 F. 2d 783.

Certiorari Granted

No. 88–1474. UNITED STATES *v.* GOODYEAR TIRE & RUBBER CO. ET AL. C. A. Fed. Cir. Certiorari granted. Reported below: 856 F. 2d 170.

No. 88–1476. CARDEN ET AL. *v.* ARKOMA ASSOCIATES. C. A. 5th Cir. Certiorari granted. Reported below: 874 F. 2d 226.

No. 88–1640. MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS ET AL. *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari granted. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 276 U. S. App. D. C. 130, 868 F. 2d 1285.

No. 88–6677. BUTLER *v.* MCKELLAR, WARDEN, ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 846 F. 2d 255.

Certiorari Denied

No. 88–234. FLORIDA POWER & LIGHT CO. ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 269 U. S. App. D. C. 377, 846 F. 2d 765.

No. 88–1142. HELBA *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 860 F. 2d 1075.

No. 88–1285. INTERMOUNTAIN RURAL ELECTRIC ASSN. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied.

No. 88–1308. VALERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 845 F. 2d 923.

No. 88–1317. CHURCHILL'S SUPER MARKETS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 857 F. 2d 1474.

No. 88–1318. PENNSYLVANIA *v.* STEIN. Sup. Ct. Pa. Certiorari denied. Reported below: 519 Pa. 137, 546 A. 2d 36.

No. 88–1346. MORELLA ET AL. *v.* COOPER/T. SMITH, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 860 F. 2d 436.

No. 88–1396. UNITED STEELWORKERS OF AMERICA, LOCAL UNION 7533 *v.* DIXIE ELECTRICAL MANUFACTURING CO. Sup. Ct. Ala. Certiorari denied. Reported below: 536 So. 2d 32.

No. 88–1397. TELECTRONICS, INC., ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 857 F. 2d 778.

No. 88–1457. OWENS *v.* TEXACO INC. C. A. 5th Cir. Certiorari denied. Reported below: 857 F. 2d 262.

No. 88–1468. JOHNSTONE *v.* AMOCO OIL CO. C. A. 7th Cir. Certiorari denied. Reported below: 856 F. 2d 967.

No. 88–1472. FULLER, INDIVIDUALLY AND AS PROVISIONAL TUTRIX OF THE MINOR, FULLER *v.* UNITED STATES AIRCRAFT INSURANCE GROUP. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 530 So. 2d 1282.

No. 88–1475. JOHNSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 536 So. 2d 957.

No. 88–1477. ABSENTEE SHAWNEE TRIBE OF INDIANS OF OKLAHOMA *v.* KANSAS. C. A. 10th Cir. Certiorari denied. Reported below: 862 F. 2d 1415.

No. 88–1484. HAWAII *v.* PROKO INDUSTRIES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 862 F. 2d 310.

No. 88–1488. CITY OF DALLAS *v.* VIDEO INTERNATIONAL PRODUCTIONS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 858 F. 2d 1075.

No. 88–1490. LOCAL LODGE D111 OF THE CEMENT, LIME, GYPSUM & ALLIED WORKERS, DIVISION OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL–CIO, ET AL. *v.* INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL–CIO. C. A. 11th Cir. Certiorari denied. Reported below: 858 F. 2d 1559.

No. 88–1494. BADALAMENTI *v.* DUNHAM'S, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 862 F. 2d 322.

No. 88–1495. MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM *v.* HIGGINS. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 760 S. W. 2d 449.

No. 88–1501. EASTMAN KODAK CO. *v.* POLAROID CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 867 F. 2d 1415.

No. 88–1505. BROOKENS *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 145 Wis. 2d 901, 428 N. W. 2d 645.

No. 88–1517. DUNNING *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 861 F. 2d 263.

No. 88–1521. BOOTH *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 26 Ark. App. 115, 761 S. W. 2d 607.

No. 88–1525. LOFTICE *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 88–1539. BAKER ET UX. *v.* PIERCE, EXECUTRIX OF THE ESTATE OF BAKER, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 256.

No. 88–1544. ADAMS *v.* PROVIDENT MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 249.

No. 88–1606. SCOPO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 861 F. 2d 339.

No. 88–1607. CLARK COUNTY, NEVADA *v.* FRANK BRISCOE CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 857 F. 2d 606.

No. 88–1615. GAENSEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 867 F. 2d 614.

No. 88–1625. THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 866 F. 2d 1414.

No. 88–1641. BODINE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 865 F. 2d 269.

No. 88–6074. MUHAMMAD, AKA METOYER *v.* WHITE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–6458. MITCHELL ET AL. *v.* DUTTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 1268.

No. 88–6470. JUVENILE MALE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 1260.

No. 88–6505. COLT *v.* UNITED STATES POSTAL SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 250.

No. 88–6513. ATHERTON *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 271 U. S. App. D. C. 273, 851 F. 2d 1500.

No. 88–6515. BRATHWAITE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1016.

No. 88–6660. PRICE *v.* UNITED STATES POSTAL SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 863 F. 2d 49.

No. 88–6693. PARKER *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 859 F. 2d 922.

No. 88–6755. LEMONS *v.* COX ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 857 F. 2d 1471.

No. 88–6758. COOK *v.* BUTLER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 865 F. 2d 1265.

No. 88-6761. YORK *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 858 F. 2d 322.

No. 88-6762. MASON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 532 N. E. 2d 1169.

No. 88-6764. RUSSELL *v.* MALDEN STATE BANK. C. A. 8th Cir. Certiorari denied.

No. 88-6765. TANG-FORTELECHE *v.* UNITED STATES;
No. 88-6779. CALLEJA *v.* UNITED STATES; and
No. 88-6893. CALLEJA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: No. 88-6765, 865 F. 2d 1261; Nos. 88-6779 and 88-6893, 865 F. 2d 1260.

No. 88-6770. HOHENSEE *v.* SMITH ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 370 Pa. Super. 657, 533 A. 2d 1081.

No. 88-6772. LYONS *v.* EASTERN AIRLINES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 844 F. 2d 795.

No. 88-6773. BARRON *v.* SALT LAKE CITY, UTAH. Ct. App. Utah. Certiorari denied.

No. 88-6776. DORTCH *v.* COHN, SUPERINTENDENT, INDIANA STATE REFORMATORY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 863 F. 2d 1337.

No. 88-6778. ANDRADES-SALINAS ET AL. *v.* UNITED STATES; and
No. 88-6781. CRESPO-HERRERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 860 F. 2d 488.

No. 88-6782. TANGWALL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 172 Ill. App. 3d 487, 526 N. E. 2d 649.

No. 88-6784. MAHLERWEIN *v.* FEDERAL LAND BANK OF LOUISVILLE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 259.

No. 88-6787. WHITE ET AL. *v.* CLEVELAND BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 861 F. 2d 722.

No. 88-6796. QUIGLEY *v.* CALIFORNIA. Super. Ct. Cal., Santa Cruz County. Certiorari denied.

No. 88-6802. STELTEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 867 F. 2d 453.

No. 88-6803. FOWLER *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 88-6806. BROOKS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 172 Ill. App. 3d 417, 526 N. E. 2d 420.

No. 88-6807. REED *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 2d 128.

No. 88-6818. ROOSE *v.* COX ET AL. C. A. 10th Cir. Certiorari denied.

No. 88-6824. ORTEGA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 253.

No. 88-6829. HALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 865 F. 2d 1272.

No. 88-6842. RUNDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 2d 1275.

No. 88-6849. RICHTER *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 308.

No. 88-6854. GLOSTER *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 872 F. 2d 1021.

No. 88-6859. GONZALEZ *v.* DEPARTMENT OF THE NAVY. C. A. 1st Cir. Certiorari denied. Reported below: 867 F. 2d 607.

No. 88-6868. DRUMMOND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 2d 1419.

No. 88-6871. MUHAMMAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 870 F. 2d 650.

No. 88-6878. CUEVAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 872 F. 2d 1022.

No. 88–6880. COOPER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 869 F. 2d 1495.

No. 88–6887. DREAD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–6889. FROMETA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 2d 1419.

No. 88–6894. DAROTI-LAGOS, AKA LAGOS-DAROTI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1422.

No. 88–6900. HOFFMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 261.

No. 88–6902. HUNT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 867 F. 2d 609.

No. 88–6905. COLON-ORTIZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 866 F. 2d 6.

No. 88–6921. CURLEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 867 F. 2d 611.

No. 88–6923. GARRETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 864 F. 2d 789.

No. 88–6926. FINN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 261.

No. 88–6933. THOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 867 F. 2d 1430.

No. 88–6939. ALVAREZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 860 F. 2d 801.

No. 88–1381. ROBLES *v.* EXXON CORP. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 862 F. 2d 1201.

No. 88–1399. PEABODY COAL CO. *v.* ARIZONA ET AL. Ct. App. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 158 Ariz. 190, 761 P. 2d 1094.

No. 88–1482. OKLAHOMA CORPORATION COMMISSION *v.* ANR PIPELINE CO. ET AL. C. A. 10th Cir. Motion of Public Service

Company of Oklahoma et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 860 F. 2d 1571.

No. 88–5804. PAULINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 850 F. 2d 93.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

In August 1987, two police officers observed a car parked in a high-crime area of New York City. Seated in the front seat of the car was its owner and another occupant; petitioner was in the back seat. The officers approached the car and began to ask questions of the owner. As they did this, they saw petitioner lean over and appear to place an object on the floor. Fearful that the item might be a weapon, the officers ordered the men out of the car and searched its interior. The front and back seat areas were searched. When one officer lifted the rear floormat, he found a packet of currency there. He picked up the packet, removed a rubber band, and examined the bills closely. He observed that all the bills had the same serial number and concluded that they were counterfeit. Petitioner was arrested and charged with a counterfeiting offense.

The District Court granted petitioner's motion to suppress the fruits of the search of the packet, but the Second Circuit reversed. 850 F. 2d 93 (1988). The panel majority agreed with petitioner that the officer, upon determining that the item beneath the floor mat was neither a weapon nor plainly contraband, "had no basis to take any further action." *Id.*, at 98. "[A]bsent either probable cause or self-evident contraband the search and seizure of these bills was unjustified," the Court of Appeals concluded. *Ibid.* However, the Second Circuit nonetheless refused to suppress the evidence so obtained because it found that petitioner lacked a "reasonable expectation of privacy in the area searched." *Ibid.*

As I see it, the decision below was incorrect; it at least merits review here. The Fourth Amendment protects from unreasonable searches not only an individual's home and person, but also his effects. Even granting that petitioner had no "expectation of privacy" in the back seat of the car, he had standing to object to the violation of his Fourth Amendment rights when an admittedly illegal search and seizure of his property was conducted. To conclude otherwise, as the Second Circuit did here, would suggest that when someone lays a sheaf of papers down on a sales counter, or places a stack of documents on the bus seat beside him, or the like, the police may come along, pick up these items, and rifle through them—even if the officers lack probable cause or reasonable suspicion or any basis whatsoever for the search or seizure. None of our precedents reflects such an interpretation of the Fourth Amendment with respect to the right to resist the search and seizure of one's possessions, even when those possessions are in public places.

In its decision below, the Court of Appeals relied on our prior rulings in *Rawlings* v. *Kentucky*, 448 U. S. 98 (1980); *United States* v. *Salvucci*, 448 U. S. 83 (1980); and *Rakas* v. *Illinois*, 439 U. S. 128 (1978). These cases do support the notion that merely having a property right in a seized item does not give one standing to challenge the unlawful search of another person's property to find that item. *Salvucci*, *supra*, at 91; *Rawlings*, *supra*, at 105–106. But this case is different from the cases on which the Second Circuit relied. In those cases, the aggrieved defendants sought to challenge the legality of searches of others' private places, when those searches revealed contraband items belonging to the defendants. In this case, though, the officers opened and examined an item belonging to petitioner which, on its face, offered no justification for such an examination. This case is thus like the one we left open in *Rakas*, *supra*, at 142, n. 11.

We have noted repeatedly in the past that the Fourth Amendment "protects people, not places." *Katz* v. *United States*, 389 U. S. 347, 351 (1967). Just because petitioner's packet was in a place that was not private does not deprive him of a right to resist a search of that packet, any more than Chadwick was so deprived by his placement of his suitcase in a car which the police had no cause to search. See *United States* v. *Chadwick*, 433 U. S. 1 (1977); *United States* v. *Ross*, 456 U. S. 798, 812–813 (1982). Simply put, the Second Circuit confused petitioner's lack of standing to challenge the search of another's car *for* an item belonging to petitioner, with petitioner's right to challenge the search *of* an item belonging to him that was found within the car.

Nor is the sweep of the ruling below limited by observing that petitioner could have preserved his privacy interest in the packet of bills if he had kept it on his person. Such a view suggests that the officers could not have taken petitioner's wallet from his person and examined its contents but could have searched his briefcase if he had had one on the seat beside him. It also suggests that the police, without a warrant or probable cause, could search and seize a person's briefcase checked in a public checkroom, or his luggage in a hotel lobby, or his personal effects in a public place. In none of these instances would such a person have standing to object to the officer's being where he was, but to say that he may not object to the seizure of his effects is suspect and merits review here. Consequently, I dissent from the Court's denial of review in this case.

No. 88-6120. HAMBSCH *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 857 F. 2d 763.

Memorandum of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

There are times when it is important to emphasize the fact that an order denying a petition for a writ of certiorari is not a ruling on the merits of any question presented by the petition. See *Singleton* v. *Commissioner*, 439 U. S. 940, 942 (1978) (STEVENS, J., respecting denial of certiorari). In my opinion, this is such an occasion.

JUSTICE O'CONNOR, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, dissenting.

In this case, the Court of Appeals has misread a statute designed to protect the rights of a class of federal workers and misapplied our decision in *United States* v. *Testan*, 424 U. S. 392 (1976). The result is a jurisdictional ruling which even respondent here, the United States, does not defend. The Solicitor General has informed this Court that the United States views the jurisdictional holding of the Court of Appeals as plainly wrong and asks that its decision be vacated and remanded. See Brief for United States 6–7. Because the error is plain, and because it carries the clear potential of compounding itself in the Back Pay Act jurisprudence of the Court of Appeals for the Federal Circuit, I would grant the petition and summarily reverse the judgment below.

Petitioner, a former member of the United States Secret Service Uniformed Division (USSSUD), was involved in a motorcycle accident while allegedly responding to a call for relief at 1310 L Street, N. W., in Washington, D. C., which is the headquarters of the Secret Service. As he and a fellow officer were passing through a private alley on motorcycles, an automobile exited from an underground garage and struck petitioner's motorcycle, pinning him underneath his vehicle. Petitioner received immediate medical care, and later underwent corrective surgery for damage to his left knee. After the accident, in order to receive paid administrative leave, petitioner requested a determination that the accident occurred in the performance of his duties. Such a determination was critical to petitioner's rights under 5 U. S. C. § 6324(a), which provides: "Sick leave may not be charged to the account of a member of the Metropolitan Police force or the Fire Department of the District of Columbia, the United States Park Police force, or the Executive Protective Service force for an absence due to injury or illness resulting from the performance of duty." Pursuant to agency regulations, an investigation and subsequent review by the Administrative Review Board were conducted. The agency determined that under its regulations petitioner's injury did not occur in "the performance of duty" due to the fact that he was in violation of local traffic regulations and USSSUD regulations at the time of the accident. Petitioner was thus denied administrative leave for the period of his convalescence, and after his sick leave was exhausted, he was placed on leave without pay.

Petitioner subsequently brought this action in the United States Claims Court, seeking a determination that he was erroneously denied paid administrative leave by the agency and was thus entitled to an award of backpay for the period in question. Petitioner premised the Claims Court's jurisdiction on that portion of the Tucker Act now codified at 28 U. S. C. § 1491(a)(1), which provides generally that the United States Claims Court "shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon . . . any Act of Congress." The "Act of Congress" upon which petitioner relied was the Back Pay Act, 5 U. S. C. § 5596, which provides in pertinent part:

> "(b)(1) An employee of an agency who . . . is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—
>
> "(A) is entitled . . . [to] . . .
>
> "(i) an amount equal to all or any part of the pay, allowances or differentials, as applicable, which the employee nor-

> mally would have earned or received during the period if the personnel action had not occurred."

In essence, petitioner claimed that 5 U. S. C. § 6324(a) was an "applicable law" within the meaning of the Back Pay Act and that the allegedly erroneous denial of his request for paid administrative leave was an "unwarranted personnel action" which entitled him to an award of lost wages against the United States. The Claims Court ruled against petitioner on the merits, finding that the agency's decision that petitioner was not injured in the performance of his duties was supported by substantial evidence and not legally arbitrary or capricious. 12 Cl. Ct. 744 (1987).

On appeal, the Court of Appeals for the Federal Circuit did not reach the merits of petitioner's claims. 857 F. 2d 763 (1988). Instead that court ruled that the Claims Court lacked jurisdiction over this action. Relying on our decision in *United States* v. *Testan*, *supra*, the Court of Appeals held that "consent to suit against the United States for back pay must be 'unequivocally expressed' and . . . 5 U. S. C. § 6324 does not express such consent." 857 F. 2d, at 764. The Court of Appeals also relied on its earlier decision in *Hambsch* v. *United States*, 848 F. 2d 1228 (1988), where it stated: "[T]he parties often speak of section 6324 as if it requires that police officers be placed on administrative leave if injured in the performance of duty, yet the statute doesn't say that. It says they must *not* be placed on sick leave. This implication from a negative may indicate an intent to create liability for back pay for violation, but it is hard to say that it does so 'unequivocally.'" *Id.*, at 1231. The Court of Appeals vacated the decision below and remanded to the Claims Court with instructions to dismiss petitioner's complaint for want of jurisdiction. 857 F. 2d, at 765.

In *United States* v. *Testan*, we dealt with a claim by Government employees that they had erroneously been classified in a pay grade lower than those who did substantially identical work in the same agency. We held that neither the Classification Act, 5 U. S. C. § 5101 *et. seq.*, nor the Back Pay Act could trigger the Tucker Act jurisdiction of the former Court of Claims in the circumstances of that case. We noted that "the Back Pay Act, as its words so clearly indicate, was intended to grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed emoluments or position." 424 U. S., at 407. The plaintiffs in *Testan* were not such employees because they were not claiming a right "to receive only the salary of the position to which [they were] appointed"; rather they sought reclassification into a *new* position and pay grade. Thus *Testan* makes clear, and our subsequent cases have reaffirmed, that the Back Pay Act *itself* is an explicit consent to suit by the United States as to a claim by a federal employee that the pay or emoluments of his or her position have been wrongfully withheld in violation of an "applicable law, rule, regulation, or collective bargaining agreement." See, *e. g.*, *United States* v. *Hopkins*, 427 U. S. 123, 128 (1976) ("The Back Pay Act is the means by which appointed employees subjected to unjustified personnel action are given a cause of action against the United States"); accord, *Bush* v. *Lucas*, 462 U. S. 367, 385, n. 25 (1983); *Bowen* v. *Massachusetts*, 487 U. S. 879, 905–906, n. 42 (1988). It follows that the Court of Appeals erred in searching for an explicit waiver of immunity from suit in § 6324; that explicit waiver is found in the Back Pay Act itself. The Court of Appeals' interpretation of *Testan* would render the Back Pay Act a nullity, for rarely if ever will an agency personnel regulation or collective bargaining agreement contain an express waiver of the sovereign immunity of the United States. The proper inquiry is simply whether the employee alleges the violation of a statute, rule, or provision of a collective bargaining agreement which has resulted in the unlawful withholding of compensation to which he or she would otherwise be entitled.

There is little doubt that the violation of 5 U. S. C. § 6324 alleged by petitioner here is exactly the type of "unwarranted personnel action" addressed by the Back Pay Act. As the Claims Court put it: "In 5 U. S. C. § 6324, Congress established a statutory right to administrative leave rather than sick leave to members of the USSSUD where an absence is due to an injury or illness resulting from the performance of duty." 12 Cl. Ct., at 749. Section 6324 appears in Subchapter 2 of Chapter 63 of Title 5 which is entitled "Other Paid Leave" and stands in contradistinction to Subchapter 1 of Chapter 63 which covers "Annual and Sick Leave." Moreover, the legislative history of § 6324, which was originally enacted in 1964, indicates that Congress intended to prohibit the taxing of sick leave against USSSUD employees injured in the performance of their duties in order to make clear their entitlement to paid administrative leave. Congress expressed concern that such employees were often required to use annual leave or leave without pay for nonwork-related illnesses because they were obligated to expend their sick leave on job-related injuries. See H. R. Rep. No. 1220, 88th Cong., 2d Sess., 1 (1964). Indeed, the Secretary of the Treasury, who is charged with promulgating regulations implementing § 6324, understands that section to create an entitlement to administrative paid leave where it is determined that the injury occurred in the performance of the officer's duties. See USSSUD Manual, chs. 2.7.22 and 2.7.23. Further, the District of Columbia Court of Appeals, which has had occasion to interpret § 6324 as it applies to members of the District of Columbia Police and Fire Departments, likewise understands that section to require that employees injured in the performance of their duties be placed on administrative paid leave. See *Brown* v. *Jefferson*, 451 A. 2d 74, 75 (1982). The Court of Appeals' contrary interpretation of § 6324 leads to incongruous results. It imputes to Congress an intent to deny to employees injured in the performance of their duties, and only such employees, the right to take sick leave. Thus, an employee injured at home would be entitled to expend available sick leave, while an employee injured in the performance of his or her duties would be prohibited by statute from taking such leave and thus would have to expend annual leave or go on leave without pay.

In my view, the jurisdictional holding of the Court of Appeals is quite clearly wrong, and as the Solicitor General points out, this jurisdictional error will preclude review in a rather large class of cases falling within its scope. Brief for United States 7. Moreover, the Court of Appeal's misinterpretation of our decision in *Testan* threatens to do continuing damage as that court searches for explicit waivers of the sovereign immunity of the United States in agency personnel rules and collective bargaining agreements. For these reasons, I would reverse the judgment of the Court of Appeals and remand this case for further proceedings not inconsistent with the principles enunciated above. In this regard, I note that the Court of Appeals made passing reference to the possible applicability of our decision in *United States* v. *Fausto*, 484 U. S. 439 (1988), to petitioner's claims. 857 F. 2d, at 764. Because the Court of Appeals did not rest its judgment on that ground, and because the Solicitor General explicitly disclaims any reliance on *Fausto* in this Court, see Brief for United States 4, n. 6, I express no opinion on this issue.

No. 88–6588. McDowell *v.* California. Sup. Ct. Cal.;

No. 88–6650. Purtell *v.* Texas. Ct. Crim. App. Tex.; and

No. 88–6716. Nevius *v.* Sumner, Director, Nevada Department of Prisons, et al. C. A. 9th Cir. Certiorari denied. Reported below: No. 88–6588, 46 Cal. 3d 551, 763 P. 2d 1269; No. 88–6650, 761 S. W. 2d 360; No. 88–6716, 852 F. 2d 463.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 88–987. Hesse *v.* Board of Education of Township High School District No. 211, Cook County, Illinois, et al., 489 U. S. 1015;

No. 88–1240. Ainsworth *v.* State Bar of California, 489 U. S. 1081;

No. 88–1279. Sutherland *v.* United States Postal Service et al., 489 U. S. 1082;

No. 88–6317. Maurer *v.* Ohio, 489 U. S. 1072; and

No. 88–6597. In re McKnight, 489 U. S. 1077. Petitions for rehearing denied.

No. 88–232. Grossman *v.* United States, 488 U. S. 1040. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

May 3, 1989

Certiorari Denied

No. 88–7140 (A–875). Adams *v.* Dugger, Secretary, Florida Department of Corrections. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to Justice Kennedy, and by him referred to the Court, denied. Certiorari denied.

Justice Brennan, with whom Justice Marshall joins, dissenting.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant the motion for a stay of execution and the petition for a writ of certiorari and vacate the death sentence in this case.

II

Even if I did not take this view, I would grant the petition to consider whether the sentencing procedure in this case violated the Eighth Amendment requirement that a convicted defendant have the opportunity to present any relevant mitigating evidence—not just statutory mitigating factors—at the sentencing hearing. *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987). The Florida Supreme Court declined to find petitioner's *Hitchcock* claim procedurally barred and addressed this claim on the merits. *Adams* v. *State*, 543 So. 2d 1244, 1247 (1989). Likewise, the District Court addressed the merits, determining that petitioner's "is not a proper *Hitchcock* issue." No. 89–67–Civ–Oc–16, p. 5 (MD Fla., May 3, 1989). Moreover, since *Hitchcock* was not decided until after petitioner had filed his second federal habeas petition, I detect no abuse of the writ in petitioner raising this claim now for the first time.

At the time petitioner was sentenced, Florida's "standard jury instructions included a charge which had the effect of limiting the jury's consideration to the statutory aggravating and mitigating circumstances," 543 So. 2d, at 1247, reflecting what may have been the general belief in the State, based upon decisions such as *Cooper* v. *State*, 336 So. 2d 1133 (Fla. 1976), that mitigating factors not specifically itemized in the statute, Fla. Stat. § 921.141 (1975), were not to be taken into account in sentencing. Reasonably believing that state law prohibited a jury or court from considering nonstatutory factors at sentencing, a Florida lawyer might rationally have declined to divert resources from other aspects of case development into the investigation, development, and presentation of evidence of such factors. Indeed, two of petitioner's counsel have filed affidavits to the effect that, operating on the basis of what they understood to be the law at the time, they did not pursue nonstatutory mitigating evidence because they did not believe it would be admissible. I would grant certiorari in this case to consider whether state-generated disincentives to the pursuit and presentation of mitigating evidence infected petitioner's sentencing with constitutional error.

The trial judge in this case initially denied petitioner's request for a sentencing instruction to the jury that they might consider nonstatutory mitigating factors. After the prosecutor's closing argument at sentencing, however, the trial judge announced that he had changed his mind, and that because the prosecutor's closing had listed statutory mitigating circumstances as the only mitigating factors the jury could consider, he would give the requested instruction that "'[t]he aggravating circumstances which you may consider are limited to those upon which I've just instructed you. However, there is no such limitation upon the mitigating factors you may consider.'" See 543 So. 2d, at 1247. This change of mind appears to have come too late to allow petitioner's counsel to develop the mitigating evidence that the court's prior ruling, and existing Florida law, had reasonably led them to believe would be inadmissible. A belated instruction to consider mitigating evidence cannot cure a defect the effect of which has been to ensure that there is little or no nonstatutory mitigating evidence for the jury or court to consider.

MAY 9, 1989

Dismissal Under Rule 53

No. 88-1456. IPPOLITO ET AL. *v.* WNS, INC. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 864 F. 2d 440.

MAY 11, 1989

Miscellaneous Order

No. A-881. LANKFORD *v.* IDAHO. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

MAY 15, 1989

Appeal Dismissed

No. 88-6811. HESLER *v.* CABINET FOR HUMAN RESOURCES OF KENTUCKY. Appeal from Ct. App. Ky. dismissed for want of substantial federal question.

Certiorari Granted—Vacated and Remanded

No. 88–1208. SANDIA FEDERAL SAVINGS & LOAN ASSN. *v.* FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR VERNON SAVINGS & LOAN ASSN. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Coit Independence Joint Venture* v. *FSLIC*, 489 U. S. 561 (1989). Reported below: 860 F. 2d 608.

No. 88–1300. FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR BOHEMIAN SAVINGS & LOAN ASSN. *v.* CAPOZZI ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *FSLIC* v. *Ticktin*, *ante*, p. 82. Reported below: 855 F. 2d 1319.

Miscellaneous Orders

No. — — ——. IN RE CRAMBLET. Motion for leave to file petition for common-law writ of habeas corpus and other relief denied.

No. — — ——. IN RE DEAN. Motion for an order to file petition for writ of habeas corpus and other relief denied.

No. D–750. IN RE DISBARMENT OF SOUCEK. Disbarment entered. [For earlier order herein, see 488 U. S. 1000.]

No. D–785. IN RE DISBARMENT OF ARONSON. It is ordered that Mitchell David Aronson, of North Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–786. IN RE DISBARMENT OF FORD. It is ordered that John J. Ford III, of San Francisco, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–787. IN RE DISBARMENT OF PRANTIL. It is ordered that Frank G. Prantil, of Fair Oaks, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–788. IN RE DISBARMENT OF CATES. It is ordered that Michael H. Cates, of Key West, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within

40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Second interim motion of the Special Master for compensation and reimbursement of expenses granted, and the Special Master is awarded $94,801.10 to be paid 40% by Nebraska, 40% by Wyoming, and 20% by the United States. [For earlier order herein, see, *e. g.*, 487 U. S. 1231.]

No. 88–124. BREININGER *v.* SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 6. C. A. 6th Cir. [Certiorari granted, 489 U. S. 1009.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88–1264. SAFFLE, WARDEN, ET AL. *v.* PARKS. C. A. 10th Cir. [Certiorari granted, *ante*, p. 1034.] Motion for appointment of counsel granted, and it is ordered that Vivian O. Berger, Esq., of New York, N. Y., be appointed to serve as counsel for respondent in this case.

No. 88–1353. UNITED STATES *v.* VERDUGO-URQUIDEZ. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1019.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 88–1374. JIMMY SWAGGART MINISTRIES *v.* BOARD OF EQUALIZATION OF CALIFORNIA. Ct. App. Cal., 4th App. Dist. [Probable jurisdiction noted, *ante*, p. 1018.] Motion of appellee to limit questions presented for review denied.

No. 88–6896. SCHAEFER *v.* TRANSPORTATION MEDIA, INC. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 5, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–6966. RITA *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 5, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–1599. IN RE VONDERSAAR;
No. 88–6826. IN RE PHILLIPS; and
No. 88–6971. IN RE WILLIAMS. Petitions for writs of mandamus denied.

No. 88–1609. IN RE HAYNES. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 88–1434. DOLE, SECRETARY OF LABOR, ET AL. *v.* UNITED STEELWORKERS OF AMERICA ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 855 F. 2d 108.

No. 88–1512. FERENS ET UX. *v.* JOHN DEERE CO. C. A. 3d Cir. Certiorari granted. Reported below: 862 F. 2d 31.

No. 88–1377. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* ZEBLEY ET AL. C. A. 3d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 855 F. 2d 67.

Certiorari Denied

No. 87–1594. CROMAN *v.* MANHATTAN COMMUNITY COLLEGE. C. A. 2d Cir. Certiorari denied. Reported below: 841 F. 2d 1116.

No. 87–1830. BLALOCK *v.* METALS TRADES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 1011.

No. 88–1070. ASSOCIATED GENERAL CONTRACTORS OF AMERICA ET AL. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRA-

TION, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 862 F. 2d 63.

No. 88–1079. KING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 860 F. 2d 54.

No. 88–1238. HERRINGTON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 854 F. 2d 755.

No. 88–1265. FAGIANO, DIRECTOR, DEPARTMENT OF INSURANCE OF IDAHO, ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 858 F. 2d 445.

No. 88–1298. MICHIGAN *v.* BOYD. Ct. App. Mich. Certiorari denied.

No. 88–1348. HELMSLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 864 F. 2d 266.

No. 88–1367. A. G. BOONE CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 274 U. S. App. D. C. 257, 863 F. 2d 946.

No. 88–1385. NATIONAL GRAIN & FEED ASSN., INC., ET AL. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 862 F. 2d 63.

No. 88–1428. COMPANIA DE DESARROLLO COOPERATIVO *v.* U. S. I. PROPERTIES CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 860 F. 2d 1.

No. 88–1433. VAUGHN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 859 F. 2d 863.

No. 88–1478. CORPUS CHRISTI TAXPAYERS ASSN. ET AL. *v.* CITY OF CORPUS CHRISTI, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 858 F. 2d 973.

No. 88–1507. MOTT *v.* KERNS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 861 F. 2d 721.

No. 88–1510. WARD ET AL. *v.* SUCCESSION OF FREEMAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 854 F. 2d 780.

No. 88–1514. NEWSPAPERS OF NEW ENGLAND, INC. *v.* CLERK-MAGISTRATE OF THE WARE DIVISION OF THE DISTRICT COURT DEPARTMENT. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 403 Mass. 628, 531 N. E. 2d 1261.

No. 88–1515. UNITED STATES, ACTING THROUGH THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT *v.* RAINIER VIEW ASSOCIATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 848 F. 2d 988.

No. 88–1522. MCCLATCHY NEWSPAPERS, INC., ET AL. *v.* MOSESIAN. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 205 Cal. App. 3d 597, 252 Cal. Rptr. 586.

No. 88–1524. CREMEANS *v.* CITY OF ROSEVILLE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 861 F. 2d 878.

No. 88–1526. ROGERS ET UX. *v.* CITY OF CHEYENNE ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–1528. STRATMORE *v.* GOODBODY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 866 F. 2d 189.

No. 88–1529. BOEHM, TAX COMMISSIONER OF NEBRASKA *v.* TRAILER TRAIN CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 885 F. 2d 415.

No. 88–1531. KINDNESS *v.* SPANG ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 251.

No. 88–1533. TWIST *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 272 U. S. App. D. C. 204, 854 F. 2d 1421.

No. 88–1535. PARKER ET AL. *v.* CONNORS STEEL CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 855 F. 2d 1510.

No. 88–1536. BOBO ET AL. *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 757 S. W. 2d 58.

No. 88–1541. FUNKHOUSER ET UX. *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 763 P. 2d 695.

No. 88–1543. KENTUCKY STATE POLICE DEPARTMENT *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 860 F. 2d 665.

No. 88–1549. MENKE *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 740 S. W. 2d 861.

No. 88–1550. MISSOURI PACIFIC RAILROAD CO. *v.* MACKEY, EXECUTRIX OF THE ESTATE OF MACKEY. Sup. Ct. Ark. Certiorari denied. Reported below: 297 Ark. 137, 760 S. W. 2d 59.

No. 88–1554. DAVIS *v.* HIMMELFARB ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 858 F. 2d 515.

No. 88–1555. STEELCASE INC. *v.* HAWORTH, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 867 F. 2d 615.

No. 88–1557. HILLVIEW ESTATES, LTD. *v.* MO-CON VENTURES, INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 88–1558. ARAGON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GONZALES *v.* ARMENTA. Sup. Ct. N. M. Certiorari denied.

No. 88–1559. GLENPOOL UTILITY SERVICES AUTHORITY *v.* CREEK COUNTY RURAL WATER DISTRICT NO. 2 ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 861 F. 2d 1211.

No. 88–1560. CHRISTIE *v.* HAWAII. Sup. Ct. Haw. Certiorari denied. Reported below: 70 Haw. 158, 766 P. 2d 1198.

No. 88–1562. HOLLISTER INC. *v.* KINGSDOWN MEDICAL CONSULTANTS, LTD., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 863 F. 2d 867.

No. 88–1565. LEEMIS *v.* HOSPITAL CORPORATION OF AMERICA. C. A. 6th Cir. Certiorari denied. Reported below: 863 F. 2d 48.

No. 88–1568. DANA CORP. *v.* IPC LIMITED PARTNERSHIP ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 860 F. 2d 415.

No. 88–1570. WASHINGTON ET UX. *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF LAPORTE COUNTY, INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 863 F. 2d 885.

No. 88–1572. CLARK *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 88–1573. ALONSO ET AL. *v.* LEO'S QUALITY FOODS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 2d 263.

No. 88–1575. ADAMS, FKA KOZA *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 104 Nev. 262, 756 P. 2d 1184.

No. 88–1576. CAMBRIDGE WIRE CLOTH CO. *v.* LAITRAM CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 863 F. 2d 855.

No. 88–1578. BOISE INDEPENDENT SCHOOL DISTRICT #1 *v.* THORNOCK, BY HIS NEXT FRIEND AND MOTHER, BAUGH, ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 115 Idaho 466, 767 P. 2d 1241.

No. 88–1579. ROSS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 88–1583. SINGER, ADMINISTRATOR OF THE ESTATE OF SINGER, ET AL. *v.* GENERAL MOTORS CORP. ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 378 Pa. Super. 658, 544 A. 2d 1049.

No. 88–1587. MAGBY *v.* WAWRZASZEK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 863 F. 2d 886.

No. 88–1596. CHENNAREDDY *v.* GENERAL ACCOUNTING OFFICE. C. A. D. C. Cir. Certiorari denied. Reported below: 275 U. S. App. D. C. 230, 865 F. 2d 1329.

No. 88–1617. HULETT *v.* DEPARTMENT OF THE NAVY. C. A. 7th Cir. Certiorari denied. Reported below: 866 F. 2d 432.

No. 88–1630. NORTH AMERICAN PHILIPS CORP. ET AL. *v.* WINDMERE CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 861 F. 2d 695.

No. 88–1656. 298.25 ACRES OF LAND, MORE OR LESS, SITUATE IN WAYNE COUNTY, WEST VIRGINIA, ET AL. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 255.

No. 88–1663. HIMMELWRIGHT *v.* FAUVER, COMMISSIONER, NEW JERSEY DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–1679. WAS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 869 F. 2d 34.

No. 88–6090. JONES *v.* NEFF ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 860 F. 2d 1079.

No. 88-6127. Redwing *v.* Joseph. Sup. Ct. S. D. Certiorari denied. Reported below: 429 N. W. 2d 49.

No. 88-6141. Lindsay et al. *v.* Borgert et al. C. A. 6th Cir. Certiorari denied. Reported below: 852 F. 2d 1287.

No. 88-6153. Baker et al. *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 1353.

No. 88-6159. J. Q. (Natural Mother) *v.* D. R. L. et al. (Adoptive Parents). Sup. Ct. Ind. Certiorari denied. Reported below: 525 N. E. 2d 298.

No. 88-6216. Bouie *v.* National Archives and Records Administration et al. C. A. 8th Cir. Certiorari denied. Reported below: 871 F. 2d 1091.

No. 88-6308. Patino *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 862 F. 2d 128.

No. 88-6330. Phillips *v.* Martinez et al. C. A. 11th Cir. Certiorari denied. Reported below: 851 F. 2d 1422.

No. 88-6360. Lam *v.* Iowa et al. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 873.

No. 88-6444. King *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 859 F. 2d 155.

No. 88-6494. Wrenn *v.* Benson et al. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 472.

No. 88-6524. Wrenn *v.* Sullivan, Secretary of Health and Human Services, et al. C. A. 2d Cir. Certiorari denied.

No. 88-6533. Fermin *v.* Commodity Futures Trading Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 273 U. S. App. D. C. 179, 858 F. 2d 774.

No. 88-6573. Ford *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 793.

No. 88-6580. Portwood, aka Tucker, et al. *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 857 F. 2d 1221.

No. 88-6581. Phillips *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 869 F. 2d 1361.

No. 88-6595. O'NEAL *v.* BORGERT, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 860 F. 2d 1080.

No. 88-6615. COLEMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 862 F. 2d 455.

No. 88-6618. FRITZ *v.* BARKER, JUDGE, KENTUCKY CIRCUIT COURT AT FAYETTE, ET AL. Sup. Ct. Ky. Certiorari denied.

No. 88-6639. GALLO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 1260.

No. 88-6641. HERBERT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 860 F. 2d 620.

No. 88-6658. WRENN *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. 2d Cir. Certiorari denied.

No. 88-6711. DIAZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 864 F. 2d 544.

No. 88-6719. STUMPF *v.* ALASKA. Ct. App. Alaska. Certiorari denied. Reported below: 749 P. 2d 880.

No. 88-6737. MCCOLPIN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 867 F. 2d 615.

No. 88-6749. GATES *v.* VASQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 88-6751. PAREZ *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 88-6760. SANDS *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA. C. A. 9th Cir. Certiorari denied.

No. 88-6771. CAMPBELL *v.* IDAHO. Ct. App. Idaho. Certiorari denied. Reported below: 114 Idaho 367, 757 P. 2d 230.

No. 88-6785. FRITZ *v.* BARKER, JUDGE, KENTUCKY CIRCUIT COURT AT FAYETTE, ET AL. Sup. Ct. Ky. Certiorari denied.

No. 88-6799. FIXEL *v.* DISTRICT COURT OF NEVADA, FIRST JUDICIAL DISTRICT. Sup. Ct. Nev. Certiorari denied. Reported below: 105 Nev. 1030.

No. 88-6813. KIM *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 2d 861.

No. 88–6815. Traylor *v.* City of Atlanta Bureau of Fire Service et al. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 198.

No. 88–6816. Berry *v.* Duckworth, Superintendent, Indiana State Prison, et al. C. A. 7th Cir. Certiorari denied. Reported below: 866 F. 2d 432.

No. 88–6823. Allen *v.* Morris, Superintendent, Southern Ohio Correctional Facility. C. A. 6th Cir. Certiorari denied. Reported below: 863 F. 2d 883.

No. 88–6825. Massey *v.* Oregon. Sup. Ct. Ore. Certiorari denied.

No. 88–6830. Bennett *v.* Fortner, Superintendent, Lawtey Correctional Institution at Lawtey, Florida, et al. C. A. 11th Cir. Certiorari denied. Reported below: 863 F. 2d 804.

No. 88–6831. Sizemore *v.* Blankenship, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 866 F. 2d 1416.

No. 88–6837. Wright *v.* Lockhart, Director, Arkansas Department of Correction. C. A. 8th Cir. Certiorari denied. Reported below: 854 F. 2d 309.

No. 88–6839. August *v.* Superior Court of California, County of Los Angeles, et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 88–6844. Williams *v.* Maryland et al. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 1262.

No. 88–6846. Summers *v.* Chavis, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 867 F. 2d 609.

No. 88–6847. Smith *v.* Bessinger, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 862 F. 2d 870.

No. 88–6851. McLaughlin *v.* Rees, Warden. C. A. 9th Cir. Certiorari denied.

No. 88–6852. Holloway *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. Reported below: 209 Conn. 636, 553 A. 2d 166.

No. 88–6862. ROARK *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 538 So. 2d 1262.

No. 88–6864. UBIDE *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 536 So. 2d 257.

No. 88–6867. LIS *v.* WOLINSKI ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 307.

No. 88–6869. LOCKHART *v.* WADE ET AL. C. A. 5th Cir. Certiorari denied.

No. 88–6874. JOHNSON *v.* WHITE. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 139 App. Div. 2d 977, 527 N. Y. S. 2d 330.

No. 88–6877. SMITH *v.* KELSO, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 863 F. 2d 1564.

No. 88–6883. HAYES *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 378 Pa. Super. 647, 544 A. 2d 1041.

No. 88–6886. FILOON *v.* WORKMEN'S COMPENSATION APPEAL BOARD. Pa. Commw. Ct. Certiorari denied.

No. 88–6888. SANDERS *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 869 F. 2d 594.

No. 88–6892. SMITH *v.* MASCHNER ET AL. Ct. App. Kan. Certiorari denied. Reported below: 13 Kan. App. 2d xxxvi, 762 P. 2d 850.

No. 88–6907. BAKER *v.* SINGLETON. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 541 So. 2d 1177.

No. 88–6918. NUBINE *v.* HOUSTON CITY POLICE DEPARTMENT. C. A. 5th Cir. Certiorari denied.

No. 88–6919. TAPIA *v.* SEGURA ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–6922. ALKHOVSKY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 168 Ill. App. 3d 1159, 539 N. E. 2d 925.

No. 88-6927. HOLOVNIA *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 26 Mass. App. 1113, 529 N. E. 2d 1369.

No. 88-6934. REIDT *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 865 F. 2d 268.

No. 88-6937. GOODSON *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 88-6938. WILLIAMS *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 13 Kan. App. 2d xlii, 766 P. 2d 204.

No. 88-6942. BELL *v.* SMITH, FORMER COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 862 F. 2d 877.

No. 88-6943. WEEDEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 869 F. 2d 592.

No. 88-6945. ESPADA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 873 F. 2d 1436.

No. 88-6946. LAROQUE *v.* DEPARTMENT OF STATE. C. A. 4th Cir. Certiorari denied. Reported below: 870 F. 2d 655.

No. 88-6949. PEROTTI ET AL. *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY AT LUCASVILLE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 861 F. 2d 721.

No. 88-6951. CROXTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 867 F. 2d 611.

No. 88-6955. WILLIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 1446.

No. 88-6964. SCHUMPERT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 859 F. 2d 926.

No. 88-6969. PROWS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 792.

No. 88-6979. LADD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88-6985. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–6996. MUNCHINSKI *v.* PETSOCK, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–6998. YOUNG *v.* SULLIVAN, SUPERINTENDENT, OSSINING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 88–7004. FLANAGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 2d 1418.

No. 88–7007. BETANCOURT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1422.

No. 88–7008. JAMES *v.* CARLSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 2d 264.

No. 88–7009. SLAUGHTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 862 F. 2d 1282.

No. 88–7017. VARELLAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 277.

No. 88–7018. HARRIATT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 870 F. 2d 652.

No. 88–7019. ABRAMSON *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 88–7025. GBOLADE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 869 F. 2d 595.

No. 88–7030. ORTIZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 867 F. 2d 1429.

No. 88–7032. MUNCY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 865 F. 2d 1273.

No. 88–7035. CHAMBERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–7037. KRAGNESS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 871 F. 2d 1094.

No. 88–7040. ALAIMO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 862 F. 2d 878.

No. 88–7042. WORSLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 869 F. 2d 595.

No. 88–7047. KAPANTAIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 870 F. 2d 652.

No. 88–7052. MARINE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 867 F. 2d 614.

No. 88–7053. LEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 867 F. 2d 609.

No. 88–7056. MONZON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 869 F. 2d 338.

No. 88–1259. GARDNER ET AL. *v.* TRIBBLE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 860 F. 2d 321.

No. 88–1380. OGLALA SIOUX TRIBE ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 862 F. 2d 275.

No. 88–1530. JULIANO *v.* COMMERCIAL LIFE INSURANCE CO. ET AL. Sup. Ct. Cal. Motion of California Medical Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 47 Cal. 3d 473, 764 P. 2d 1059.

No. 88–1574. BURT *v.* JUSTICES OF THE SUPREME COURT OF IDAHO ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 835 F. 2d 1434.

No. 88–1662. ROMP *v.* UNITED STATES. C. A. 6th Cir. Certiorari before judgment denied.

No. 88–6516. HARRIS *v.* WASHINGTON. Sup. Ct. Wash.;
No. 88–6642. ALBANESE *v.* ILLINOIS. Sup. Ct. Ill.;
No. 88–6666. CHANDLER *v.* FLORIDA. Sup. Ct. Fla.;
No. 88–6789. ZEITVOGEL *v.* MISSOURI. Ct. App. Mo., Western Dist.;
No. 88–6810. LEE *v.* GEORGIA. Sup. Ct. Ga.;
No. 88–6812. BROOM *v.* OHIO. Sup. Ct. Ohio;
No. 88–6860. SNELL *v.* ARKANSAS. Sup. Ct. Ark.; and
No. 88–6891. JONES *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: No. 88–6516, 111 Wash. 2d 691, 763 P. 2d 823; No. 88–6642, 125 Ill. 2d 100, 531 N. E.

2d 17; No. 88–6666, 534 So. 2d 701; No. 88–6789, 760 S. W. 2d 466; No. 88–6810, 258 Ga. 762, 374 S. E. 2d 199; No. 88–6812, 40 Ohio St. 3d 277, 533 N. E. 2d 682; No. 88–6860, 296 Ark. xx; No. 88–6891, 864 F. 2d 348.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88–6542. GATES *v.* VASQUEZ, WARDEN. C. A. 9th Cir. Petition for writ of certiorari and petition for writ of habeas corpus denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 88–6963. CARSETTI *v.* BRONSON, WARDEN. C. A. 1st Cir. Certiorari denied. JUSTICE WHITE dissents from the denial of certiorari.

Rehearing Denied

No. 87–1602. CASTILLE, DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, ET AL. *v.* PEOPLES, 489 U. S. 346;

No. 87–6431. SCHMUCK *v.* UNITED STATES, 489 U. S. 705;

No. 88–900. KERR *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, 488 U. S. 1011;

No. 88–1192. GRAHAM *v.* BETTIS, JUDGE, ET AL., 489 U. S. 1079;

No. 88–1201. HARDEN *v.* BERT ET AL., 489 U. S. 1079;

No. 88–1272. H. K. PORTER CO., INC. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC, ET AL., 489 U. S. 1096;

No. 88–1310. BRENT *v.* NATIONAL RAILROAD PASSENGER CORPORATION, DBA AMTRAK, ET AL., *ante*, p. 1005;

No. 88–1334. WILLIAMS *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL., 489 U. S. 1082;

No. 88–5952. BILDER *v.* OHIO, 488 U. S. 1044;

No. 88–5961. COPELAND *v.* LOUISIANA, 489 U. S. 1091;
No. 88–6096. AUCOIN *v.* TENNESSEE, 489 U. S. 1084;
No. 88–6126. WHITWORTH *v.* UNITED STATES, 489 U. S. 1084;
No. 88–6247. HERMAN *v.* GEER ET AL., 489 U. S. 1030;
No. 88–6393. WOOMER *v.* AIKEN, WARDEN, ET AL., 489 U. S. 1091;
No. 88–6401. MARTIN *v.* COMMONWEALTH NATIONAL BANK ET AL., *ante*, p. 1008;
No. 88–6420. PRICE *v.* MARYLAND, 489 U. S. 1086;
No. 88–6464. FIXEL *v.* WHITLEY, WARDEN, 489 U. S. 1087;
No. 88–6503. MINTON *v.* SHEET METAL WORKERS LOCAL UNION NO. 54, AFL–CIO, ET AL., 489 U. S. 1098;
No. 88–6558. RITTENOUR *v.* MARYLAND, 489 U. S. 1088;
No. 88–6575. LANDES *v.* YOST, COMMANDANT, UNITED STATES COAST GUARD, *ante*, p. 1009;
No. 88–6647. GROWNEY *v.* GROWNEY ET AL., 489 U. S. 1099;
No. 88–6652. VAN HOOK *v.* OHIO, 489 U. S. 1100;
No. 88–6672. DONALD *v.* GEORGIA, *ante*, p. 1010;
No. 88–6710. LAURENCO *v.* SULLIVAN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, *ante*, p. 1010;
No. 88–6746. LAWRENCE *v.* UNITED STATES RAILROAD RETIREMENT BOARD, *ante*, p. 1027; and
No. 88–6780. GOVAN *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL., *ante*, p. 1011. Petitions for rehearing denied.

MAY 18, 1989

Miscellaneous Orders

No. A–903. BOYLSTON, ATTORNEY AD LITEM FOR UNBORN CHILD OF T. W. *v.* T. W. Dist. Ct. App. Fla., 5th Dist. Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* denied. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. The order heretofore entered by JUSTICE KENNEDY on May 16, 1989, is vacated.

No. A–912. WILLIS *v.* ZANT, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

MAY 22, 1989

Appeal Dismissed

No. 88–1095. HOWE ET UX. *v.* NORCHEK OF NEWPORT, INC., DBA WOODY'S WHARF, ET AL. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of substantial federal question.

Certiorari Granted—Vacated and Remanded

No. 87–1994. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* LAWSON ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Thornburgh* v. *Abbott*, *ante*, p. 401. Reported below: 840 F. 2d 779 and 781.

No. 88–284. DAIN BOSWORTH INC. *v.* JOHNSON ET AL. Ct. App. Minn. Motion of Securities Industry Association et al. for leave to file a brief as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, *ante*, p. 477. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and this case. Reported below: 420 N. W. 2d 264.

Miscellaneous Orders

No. — — ——. IN RE BYERS. Motion to order the Clerk to file petition for writ of habeas corpus and other relief denied.

No. — — ——. PHILLIPS PETROLEUM CO. *v.* GRAY ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–819. CRESCENZI *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. D–743. IN RE DISBARMENT OF CARTER. Disbarment entered. [For earlier order herein, see 488 U. S. 963.]

No. D–774. IN RE DISBARMENT OF GUNDERMAN. Disbarment entered. [For earlier order herein, see 489 U. S. 1075.]

No. D–789. IN RE DISBARMENT OF GUINAN. It is ordered that Michael Joseph Guinan, of Oxford, Wis., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 87–1979. CHESAPEAKE & OHIO RAILWAY CO. *v.* SCHWALB ET AL.; and

No. 88–127. NORFOLK & WESTERN RAILWAY CO. *v.* GOODE. Sup. Ct. Va. [Certiorari granted, 489 U. S. 1009.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88–1319. COMMISSIONER OF INTERNAL REVENUE *v.* INDIANAPOLIS POWER & LIGHT CO. C. A. 7th Cir. [Certiorari granted, *ante*, p. 1033.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 88–6546. DURO *v.* REINA, CHIEF OF POLICE, SALT RIVER DEPARTMENT OF PUBLIC SAFETY, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1034.] Motion for appointment of counsel granted, and it is ordered that John J. Trebon, Esq., of Flagstaff, Ariz., be appointed to serve as counsel for petitioner in this case.

No. 88–6677. BUTLER *v.* MCKELLAR, WARDEN, ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 1045.] Motion for appointment of counsel granted, and it is ordered that John H. Blume, Esq., of Columbia, S. C., be appointed to serve as counsel for petitioner in this case.

No. 88–6732. LASHLEY ET UX. *v.* FIRST NATIONAL BANK OF LIVE OAK. C. A. 11th Cir. Motion of petitioners for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1033] denied.

No. 88–7002. IN RE GEURIN. Petition for writ of mandamus denied.

No. 88–1598. IN RE HOOKER. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 88–1323. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* EVERHART ET AL. C. A. 10th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 853 F. 2d 1532.

Certiorari Denied

No. 88–1012. SINGH ET AL. *v.* DREXEL BURNHAM LAMBERT INC. ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 529 So. 2d 1235.

No. 88–1383. ROTH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 860 F. 2d 1382.

No. 88–1463. WRENN *v.* STATE INDUSTRIAL INSURANCE SYSTEM. Sup. Ct. Nev. Certiorari denied. Reported below: 104 Nev. 536, 762 P. 2d 884.

No. 88–1464. GREENBERG *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 534 So. 2d 1142.

No. 88–1496. CITY OF CHICAGO ET AL. *v.* BIENEMAN;
No. 88–1497. BIENEMAN *v.* CITY OF CHICAGO ET AL.; and
No. 88–1670. AMERICAN AIRLINES, INC., ET AL. *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 864 F. 2d 463.

No. 88–1520. MEDICAL MALPRACTICE INSURANCE ASSN. *v.* SUPERINTENDENT OF INSURANCE OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 72 N. Y. 2d 753, 533 N. E. 2d 1030.

No. 88–1577. FLITCRAFT ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 863 F. 2d 342.

No. 88–1584. SIZEMORE *v.* TEXAS BOARD OF DENTAL EXAMINERS. Sup. Ct. Tex. Certiorari denied. Reported below: 759 S. W. 2d 114.

No. 88–1588. BOYCE *v.* ISRAELITE BIBLE CLASS, INC. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 171 Ill. App. 3d 1166, 543 N. E. 2d 625.

No. 88–1589. FITANIDES *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 131 N. H. 298, 552 A. 2d 1379.

No. 88–1590. RUSSELL *v.* PENNSYLVANIA. Ct. Common Pleas of Lancaster County, Pa. Certiorari denied.

No. 88–1593. SPARKS *v.* ARMSTRONG RUBBER CO. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 258.

No. 88–1594. WINROD ET VIR *v.* FORD MOTOR CO. ET AL. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 53 Ohio App. 3d 94, 557 N. E. 2d 1250.

No. 88–1605. LUPO ET AL. *v.* R. ROWLAND & CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 857 F. 2d 482.

No. 88–1608. CEDAR CREST #10, INC. *v.* CITY OF DALLAS. Ct. App. Tex., 11th Dist. Certiorari denied. Reported below: 754 S. W. 2d 351.

No. 88–1612. HODGE *v.* KELLY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 868 F. 2d 1267.

No. 88–1613. DOWLING *v.* ALABAMA STATE BAR. Sup. Ct. Ala. Certiorari denied. Reported below: 539 So. 2d 149.

No. 88–1614. MOLINA *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 88–1622. MITCHELL *v.* BOARD OF TRUSTEES OF THE LOS ANGELES COMMUNITY COLLEGE DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 861 F. 2d 198.

No. 88–1631. CUMMINGS *v.* ACF INDUSTRIES ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 743 S. W. 2d 542.

No. 88–1632. RAHMANI *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 748 S. W. 2d 618.

No. 88–1645. CRUZ *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 274 U. S. App. D. C. 70, 861 F. 2d 303.

No. 88–1646. LAUPOT *v.* BERLEY, EXECUTOR OF THE ESTATE OF BERLEY. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 255.

No. 88–1655. FLORES *v.* DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION ET AL. Ct. App. D. C. Certiorari denied. Reported below: 547 A. 2d 1000.

No. 88-1672. ACOSTA *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied. Reported below: 860 F. 2d 1073.

No. 88-1673. BONELLO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 210 Conn. 51, 554 A. 2d 277.

No. 88-1681. KEEHAN *v.* OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 88-1682. BREMNER ET AL. *v.* HAWAII HOUSING AUTHORITY ET AL. Sup. Ct. Haw. Certiorari denied.

No. 88-1683. SHELDON HALL CLOTHING, INC., ET AL. *v.* TRUSTEES OF THE AMALGAMATED INSURANCE FUND. C. A. 3d Cir. Certiorari denied. Reported below: 862 F. 2d 1020.

No. 88-1693. KAZMANN *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 863 F. 2d 881.

No. 88-1734. DAYTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 869 F. 2d 1500.

No. 88-5935. FULFORD *v.* BUTLER, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 526 So. 2d 790.

No. 88-6359. BEVERLY *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 854 F. 2d 412.

No. 88-6404. SCOTT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 88-6440. GOODWIN, AKA MCGAVIN *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 88-6563. CAMPILLO *v.* SULLIVAN, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 853 F. 2d 593.

No. 88-6649. SAVAGE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 863 F. 2d 595.

No. 88-6808. MONTAGUE *v.* CITY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–6865. Zatko *v.* United States District Court for the Eastern District of California. C. A. 9th Cir. Certiorari denied.

No. 88–6890. Breest *v.* Cunningham, Warden. C. A. 1st Cir. Certiorari denied. Reported below: 867 F. 2d 607.

No. 88–6901. Giles *v.* Land, Judge, Superior Court of Georgia, Muscogee County. C. A. 11th Cir. Certiorari denied.

No. 88–6903. Patterson *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 88–6904. McDonald *v.* Yellow Cab Metro, Inc. Sup. Ct. Tenn. Certiorari denied.

No. 88–6906. East *v.* Lockhart, Director, Arkansas Department of Correction. C. A. 8th Cir. Certiorari denied.

No. 88–6910. Manross et al. *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 40 Ohio St. 3d 180, 532 N. E. 2d 735.

No. 88–6912. Williams *v.* Harris. C. A. 11th Cir. Certiorari denied.

No. 88–6915. Yates *v.* Banks. C. A. 5th Cir. Certiorari denied. Reported below: 863 F. 2d 881.

No. 88–6916. Rosberg *v.* United States Court of Appeals for the Eighth Circuit. C. A. 8th Cir. Certiorari denied.

No. 88–6920. Layton *v.* Whitley, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 867 F. 2d 613.

No. 88–6924. Cramer *v.* Kansas. Ct. App. Kan. Certiorari denied. Reported below: 13 Kan. App. 2d xxxvi, 761 P. 2d 801.

No. 88–6925. Chase *v.* Oregon. Ct. App. Ore. Certiorari denied.

No. 88–6928. Fica *v.* Dugger, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 88–6932. Eubanks et ux. *v.* South Carolina National Bank et al. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 604.

No. 88–6940. De Young *v.* Norman et al. C. A. 8th Cir. Certiorari denied.

No. 88-6950. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 173 Ill. App. 3d 998, 527 N. E. 2d 1317.

No. 88-6975. AHMED *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 864 F. 2d 150.

No. 88-6984. ARCHULETA *v.* KERBY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 864 F. 2d 709.

No. 88-7005. SCHULTZ *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 868 F. 2d 1277.

No. 88-7027. CURTIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1029.

No. 88-7034. HERMANSKI, AKA LAMBERT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 861 F. 2d 1240.

No. 88-7068. CHIZMADIA *v.* SMILEY'S POINT CLINIC ET AL. Ct. App. Minn. Certiorari denied. Reported below: 428 N. W. 2d 459.

No. 88-7088. THOMPSON *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied.

No. 88-1178. KEANE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 852 F. 2d 199.

No. 88-1600. HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY ET AL. *v.* MOLKO ET AL. Sup. Ct. Cal. Motions of National Council of Churches of Christ in the U. S. A. et al. and Society for the Scientific Study of Religion et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 46 Cal. 3d 1092, 762 P. 2d 46.

No. 88-1603. NORTHERN PROPANE GAS CO. *v.* MCGAHEE. C. A. 11th Cir. Motion of Business Roundtable for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 858 F. 2d 1487.

No. 88-1618. PARISIEN, DBA PARISIEN EXCAVATION *v.* TWIN CITY CONSTRUCTION COMPANY OF FARGO ET AL. C. A. 8th Cir. Motion of Turtle Mountain Band of Chippewa Indians et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 866 F. 2d 971.

No. 88-1643. STEPHENSON *v.* MCLEAN CONTRACTING CO., INC. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 863 F. 2d 340.

No. 88-6804. FOSTER *v.* GEORGIA. Sup. Ct. Ga.;
No. 88-6828. GACY *v.* ILLINOIS. Sup. Ct. Ill.;
No. 88-6931. POE *v.* TENNESSEE. Sup. Ct. Tenn.; and
No. 88-7045. GRUBBS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: No. 88-6804, 258 Ga. 736, 374 S. E. 2d 188; No. 88-6828, 125 Ill. 2d 117, 530 N. E. 2d 1340; No. 88-6931, 755 S. W. 2d 41; No. 88-7045, 760 S. W. 2d 115.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88-6948. SEVER *v.* AKERS ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 862 F. 2d 310.

Rehearing Denied

No. 88-1049. GRANGE INSURANCE ASSN. *v.* WASHINGTON ET AL., *ante*, p. 1004;
No. 88-1257. KERTESZ *v.* UNIVERSITY OF SOUTHERN CALIFORNIA, 489 U. S. 1067;
No. 88-6532. LARSON *v.* TEXAS, *ante*, p. 1008;
No. 88-6571. HILLMAN *v.* CITY OF SPOKANE, *ante*, p. 1009;
No. 88-6592. PENNOCK *v.* ARTHUR F. SCHULTZ CO. ET AL., *ante*, p. 1009;
No. 88-6593. PETRARCA *v.* PICERNE ET AL., *ante*, p. 1009;
No. 88-6637. DAWN ET UX. *v.* RICHMOND ET AL., *ante*, p. 1010;
No. 88-6648. MAZAK *v.* RISON, WARDEN, *ante*, p. 1010; and
No. 88-6697. LEAL *v.* CORONADO, *ante*, p. 1027. Petitions for rehearing denied.

No. 88–6608. KUNEK *v.* COFFMAN ET AL., 489 U. S. 1089. Motion for leave to file petition for rehearing denied.

MAY 23, 1989

Dismissal Under Rule 53

No. 88–688. PEAT MARWICK MAIN & CO. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari dismissed under this Court's Rule 53. Reported below: 200 Cal. App. 3d 272, 245 Cal. Rptr. 873.

Miscellaneous Order

No. A–923. MCCOY *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

MAY 25, 1989

Miscellaneous Order

No. A–937. LINDSEY *v.* THIGPEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

MAY 26, 1989

Dismissal Under Rule 53

No. 88–1207. G. K. C. MICHIGAN THEATRES, INC., ET AL. *v.* NATIONAL AMUSEMENTS, INC. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 854 F. 2d 135.

MAY 30, 1989

Certiorari Granted—Affirmed. (See No. 88–6066, *ante,* p. 638.)

Certiorari Granted—Vacated and Remanded

No. 87–1422. JUSTICE *v.* DENNIS. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Graham* v. *Connor, ante,* p. 386. Reported below: 834 F. 2d 380.

No. 87–6899. CALLWOOD *v.* QUESTEL ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hardin* v. *Straub, ante,* p. 536. Reported below: 838 F. 2d 459.

No. 88–1581. COUNTY OF LOS ANGELES ET AL. *v.* CABRALES. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Canton* v. *Harris,* 489 U. S. 378 (1989). JUSTICE MARSHALL and JUSTICE STEVENS dissent and would deny certiorari. Reported below: 864 F. 2d 1454.

No. 88–5152. PEROTTI *v.* CARTY ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hardin* v. *Straub, ante,* p. 536. Reported below: 848 F. 2d 193.

No. 88–5213. GAVIN *v.* WELLS, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Maleng* v. *Cook, ante,* p. 488. Reported below: 842 F. 2d 331.

No. 88–5783. CHRISTIAN *v.* LARKIN ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted.

Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hardin* v. *Straub*, *ante*, p. 536. Reported below: 853 F. 2d 926.

No. 88–6316. BLANKENSHIP *v.* PARRATT ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hardin* v. *Straub*, *ante*, p. 536. Reported below: 871 F. 2d 1090.

No. 88–6434. FARMER *v.* SEITER ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hardin* v. *Straub*, *ante*, p. 536. JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY would deny certiorari. Reported below: 860 F. 2d 1078.

Miscellaneous Orders

No. – – ——. ALCOLAC, INC. *v.* ELAM ET AL. Motion to dispense with printing the appendix to the petition for writ of certiorari granted.

No. – – ——. PASULKA ET UX. *v.* KOOB, TRUSTEE, ET AL. Motion to direct the Clerk to docket an appeal out of time denied.

No. A–911 (88–1784). GREAT REPUBLIC INSURANCE CO. ET AL. *v.* CHEVAL, BY AND THROUGH HER CONSERVATOR, MILLER. Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted, and it is ordered that the judgment of the Court of Appeal of California, First Appellate District, case No. A040344, entered January 5, 1989, be stayed pending disposition of the petition for writ of certiorari. In the event the petition for writ of certiorari is denied, this order terminates automatically. Should the petition for writ of certiorari be granted, this order is to remain in effect pending the issuance of the mandate of this Court. This order is further conditioned upon the certificates of deposit presently in the custody of the California Superior Court remaining in effect.

No. D–762. IN RE DISBARMENT OF KOTZKER. Disbarment entered. [For earlier order herein, see 488 U. S. 1038.]

No. D–773. IN RE DISBARMENT OF GAGEN. Disbarment entered. [For earlier order herein, see 489 U. S. 1075.]

No. D–790. In re Disbarment of Fitzgerald. It is ordered that John P. Fitzgerald, of Jupiter, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 88–7146. Whitmore, Individually and as Next Friend of Simmons *v.* Arkansas et al. Sup. Ct. Ark. Motion of respondent Simmons for expedited review denied. Motion of respondent Simmons for oral argument denied. Motion of respondent Simmons to be present at oral argument denied. Motion of respondent Simmons to require petitioner to post bond denied.

No. 88–6989. In re Balawajder; and
No. 88–7012. In re Reid. Petitions for writs of mandamus denied.

Certiorari Granted

No. 88–1650. Tafflin et al. *v.* Levitt et al. C. A. 4th Cir. Certiorari granted limited to Question 2 presented by the petition. Reported below: 865 F. 2d 595.

Certiorari Denied

No. 88–589. Sullivan *v.* Hartford Accident & Indemnity Co. et al. C. A. 7th Cir. Certiorari denied. Reported below: 846 F. 2d 377.

No. 88–761. Yoder *v.* Celebrezze, Attorney General of Ohio. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 197.

No. 88–1039. Smith et al. *v.* Prisco et al. C. A. 3d Cir. Certiorari denied. Reported below: 851 F. 2d 93.

No. 88–1271. Klepak *v.* Dole, Secretary of Labor. C. A. 5th Cir. Certiorari denied. Reported below: 853 F. 2d 1298.

No. 88–1344. Miron *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 859 F. 2d 1078.

No. 88–1349. Richmann *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 837.

No. 88–1388. LO Shippers Action Committee *v.* Interstate Commerce Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 273 U. S. App. D. C. 11, 857 F. 2d 802.

No. 88–1426. OMAHA INDIAN TRIBE ET AL. *v.* JACKSON ET AL.;
No. 88–1592. WILSON ET AL. *v.* OMAHA INDIAN TRIBE ET AL.; and
No. 88–1636. IOWA ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 854 F. 2d 1089.

No. 88–1445. NATIONAL ASSOCIATION OF CASUALTY & SURETY AGENTS ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 272 U. S. App. D. C. 328, 856 F. 2d 282.

No. 88–1451. LEVY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 862 F. 2d 305.

No. 88–1458. RIDER *v.* UNITED STATES POSTAL SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 2d 239.

No. 88–1504. ETLIN *v.* ETLIN. Ct. App. Va. Certiorari denied.

No. 88–1527. YUN KIL MOON *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 262.

No. 88–1580. DEL PERCIO, INC., ET AL. *v.* CITY OF DAYTONA BEACH. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 792.

No. 88–1610. DOUGLAS COUNTY SCHOOL DISTRICT ET AL. *v.* JAGER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 862 F. 2d 824.

No. 88–1624. SAFRANEK *v.* TOWN OF LIMON ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–1627. MOTHER & UNBORN BABY CARE OF NORTH TEXAS, INC., ET AL. *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 749 S. W. 2d 533.

No. 88–1629. GEORGIA ASSOCIATION FOR RETARDED CITIZENS ET AL. *v.* MCDANIEL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 855 F. 2d 805.

No. 88–1633. WARREN *v.* CITY OF LINCOLN, NEBRASKA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 864 F. 2d 1436.

No. 88–1634. WIGGINS *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 88–1644. LDB CORP. *v.* GIBRALTAR SAVINGS. C. A. 5th Cir. Certiorari denied. Reported below: 860 F. 2d 1275.

No. 88–1652. EMERICK *v.* BORDEN ET UX. App. Ct. Conn. Certiorari denied. Reported below: 17 Conn. App. 802, 549 A. 2d 681.

No. 88–1661. RIST, ACTING WARDEN *v.* SATTER. Sup. Ct. S. D. Certiorari denied. Reported below: 434 N. W. 2d 725.

No. 88–1667. KLEIN *v.* PETERSON, DEPUTY COMMISSIONER OF PATENTS AND TRADEMARKS, ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 866 F. 2d 412.

No. 88–1676. EXPRESS COURIER, INC. *v.* NEW YORK STATE DEPARTMENT OF LABOR ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 138 App. Div. 2d 982, 525 N. Y. S. 2d 748.

No. 88–1695. STEVENS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 28 M. J. 159.

No. 88–1722. SCHNEBERGER ET AL. *v.* UNITED STATES TRUST COMPANY OF NEW YORK ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 859 F. 2d 1477.

No. 88–1728. SCHIRMER *v.* EASTMAN KODAK CO. C. A. 3d Cir. Certiorari denied. Reported below: 869 F. 2d 591.

No. 88–1741. GRISWOLD INSTITUTE, INC., ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 261.

No. 88–1757. COVATTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 869 F. 2d 592.

No. 88–1763. KOVEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 869 F. 2d 592.

No. 88–1774. WOO *v.* UNITED STATES NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 847 F. 2d 841.

No. 88-5468. JONES *v.* BOARD OF POLICE COMMISSIONERS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 844 F. 2d 500.

No. 88-6634. BATTLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 1260.

No. 88-6638. EVANS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 27 M. J. 447.

No. 88-6742. DEEL *v.* JACKSON, COMMISSIONER, VIRGINIA DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 862 F. 2d 1079.

No. 88-6792. VOLK *v.* HOBSON ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 866 F. 2d 1398.

No. 88-6794. SKAGGS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88-6870. BURKS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 869 F. 2d 587.

No. 88-6876. HOPE *v.* DERWINSKI ET AL. C. A. 8th Cir. Certiorari denied.

No. 88-6956. DESDUNES *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 538 So. 2d 618.

No. 88-6958. LIGHTSEY *v.* YEAGER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88-6961. OWEN *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 538 So. 2d 1269.

No. 88-6962. THOMPSON *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 863 F. 2d 880.

No. 88-6973. BEAL *v.* SETZER, SUPERINTENDENT, McDOWELL CORRECTIONAL CENTER AT MARION, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 1256.

No. 88-6982. WILHELM, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILHELM *v.* GRAY, COURT CLERK OF OKLAHOMA

COUNTY. Sup. Ct. Okla. Certiorari denied. Reported below: 766 P. 2d 1357.

No. 88–6988. CRAIG *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 88–6991. WILLIAMS *v.* BARWICK. C. A. 11th Cir. Certiorari denied.

No. 88–6992. WILLIAMS *v.* WALLMAN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–6994. WILLIAMS *v.* LITTLE FLOWER CHILDRENS SERVICES. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 143 App. Div. 2d 1074, 533 N. Y. S. 2d 412.

No. 88–7003. BOOT *v.* ZARKO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 859 F. 2d 154.

No. 88–7006. LINDO *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 2d 264.

No. 88–7023. ELLIOTT ET VIR *v.* FELLOWS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 857 F. 2d 1477.

No. 88–7028. BURDEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1422.

No. 88–7031. POWERS *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 878 F. 2d 1443.

No. 88–7036. KIRKLAND *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 88–7039. WATSON *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 538 So. 2d 1258.

No. 88–7043. PETTIS *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1492.

No. 88–7059. GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 2d 781.

No. 88–7061. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 835 F. 2d 1436.

No. 88-7069. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 854 F. 2d 340.

No. 88-7074. MCNEAL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 865 F. 2d 1167.

No. 88-7080. MUMFORD *v.* BROWN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 872 F. 2d 418.

No. 88-7085. GARCIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 868 F. 2d 114.

No. 88-7086. GALLEGOS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88-7087. HERNANDEZ-BELTRAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 867 F. 2d 224.

No. 88-7091. UNDERWOOD *v.* WINEBRENNER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 869 F. 2d 595.

No. 88-7097. SIMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 2d 875.

No. 88-7106. LANGE *v.* MCCAUGHTRY, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 869 F. 2d 1008.

No. 88-7108. BROOKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 868.

No. 88-7112. COOPER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 868 F. 2d 1505.

No. 88-7121. HOFFER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 869 F. 2d 123.

No. 88-7125. SLOVACEK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 867 F. 2d 842.

No. 88-7127. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 870 F. 2d 656.

No. 88-7144. MORAN *v.* WELLS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 88-7155. SCOTT *v.* VIRGINIA. Ct. App. Va. Certiorari denied. Reported below: 7 Va. App. 252, 372 S. E. 2d 771.

No. 88-1331. ROY *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. JUSTICE WHITE and JUSTICE KENNEDY would grant certiorari. Reported below: 172 Ill. App. 3d 16, 526 N. E. 2d 204.

No. 88-1417. JARUSIRINUKUL *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 147 Wis. 2d 884, 434 N. W. 2d 623.

No. 88-1666. CALIFORNIA *v.* LEICHTY. Ct. App. Cal., 4th App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 205 Cal. App. 3d 914, 252 Cal. Rptr. 669.

No. 88-6736. FRANK, AKA ROY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 864 F. 2d 992.

No. 88-6968. MALONE *v.* CALIFORNIA. Sup. Ct. Cal.; and
No. 88-6995. MOORE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: No. 88-6968, 47 Cal. 3d 1, 762 P. 2d 1249; No. 88-6995, 47 Cal. 3d 63, 762 P. 2d 1218.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 88-1263. HOHL, ON BEHALF OF HIMSELF AND HIS DAUGHTERS, HOHL ET AL. *v.* MILLER, MAGISTRATE, CASS COUNTY MAGISTRATE'S COURT, 489 U. S. 1081;
No. 88-1336. JIMINEZ ET AL. *v.* BP OIL, INC., *ante*, p. 1011;
No. 88-6562. HANCE *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER AT JACKSON, *ante*, p. 1012;
No. 88-6567. GANEY *v.* BARNETT, SUPERINTENDENT, EASTERN CORRECTIONAL INSTITUTION AT MAURY, NORTH CAROLINA, ET AL., *ante*, p. 1024;

No. 88–6568. GANEY *v.* GARRISON ET AL., *ante,* p. 1024;
No. 88–6577. MORRISON *v.* GEORGIA, *ante,* p. 1012;
No. 88–6656. SOWELL *v.* OHIO, *ante,* p. 1028;
No. 88–6662. ARMSTRONG *v.* KINCHELOE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, ET AL., *ante,* p. 1025;
No. 88–6738. KARRIEM *v.* DISTRICT OF COLUMBIA, *ante,* p. 1038; and
No. 88–6866. MILNES *v.* UNITED STATES, *ante,* p. 1039. Petitions for rehearing denied.

JUNE 5, 1989

Vacated and Remanded on Appeal

No. 88–1423. KOPFMAN *v.* KOPFMAN. Appeal from Ct. App. Cal., 5th App. Dist. Judgment vacated and case remanded for further consideration in light of *Mansell* v. *Mansell, ante,* p. 581.

Miscellaneous Orders

No. — — ——. TUAN ANH NGUYEN *v.* OKLAHOMA. Motion to file petition for writ of certiorari without an affidavit of indigency executed by petitioner granted.

No. — — ——. FOLLETT *v.* HERMAN. Motion for leave to file petition for writ of habeas corpus and other relief denied.

No. A–914 (88–7246). FREY *v.* PENNSYLVANIA. Sup. Ct. Pa. Application for stay of execution of sentence of death, presented to JUSTICE BRENNAN, and by him referred to the Court, denied. JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS would grant the application.

No. D–772. IN RE DISBARMENT OF BROWN. Disbarment entered. [For earlier order herein, see 489 U. S. 1075.]

No. D–775. IN RE DISBARMENT OF GRAVES. David Hardin Graves, of Houston, Tex., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on March 20, 1989 [489 U. S. 1075], is hereby discharged.

No. 88–599. WASHINGTON ET AL. *v.* HARPER. Sup. Ct. Wash. [Certiorari granted, 489 U. S. 1064.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88–1198. FEDERAL TRADE COMMISSION *v.* SUPERIOR COURT TRIAL LAWYERS ASSN.; and

No. 88–1393. SUPERIOR COURT TRIAL LAWYERS ASSN. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. D. C. Cir. [Certiorari granted, *ante,* p. 1019.] Motion of the parties to dispense with printing the joint appendix granted.

No. 88–7016. IN RE MARTIN; and

No. 88–7038. IN RE WATERS. Petitions for writs of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 87–1955. LEWIS, COMPTROLLER OF THE STATE OF FLORIDA *v.* CONTINENTAL BANK CORP. ET AL. Appeal from C. A. 11th Cir. Probable jurisdiction noted. Reported below: 827 F. 2d 1517 and 838 F. 2d 457.

Certiorari Granted

No. 88–1668. ATLANTIC RICHFIELD CO. *v.* USA PETROLEUM CO. C. A. 9th Cir. Certiorari granted. Reported below: 859 F. 2d 687.

No. 88–1369. MARYLAND *v.* BUIE. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 314 Md. 151, 550 A. 2d 79.

No. 88–6613. BOYDE *v.* CALIFORNIA. Sup. Ct. Cal. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 46 Cal. 3d 212, 758 P. 2d 25.

Certiorari Denied

No. 87–1941. RUSSELL *v.* RUSSELL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 520 So. 2d 435.

No. 88–1342. SEQUOIA BOOKS, INC. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 172 Ill. App. 3d 627, 527 N. E. 2d 50.

No. 88–1357. UGALDE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 861 F. 2d 802.

No. 88–1415. FACCHIANO ET AL. *v.* UNITED STATES DEPARTMENT OF LABOR ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 859 F. 2d 1163.

No. 88–1424. STUART-JAMES CO., INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 273 U. S. App. D. C. 5, 857 F. 2d 796.

No. 88–1446. NEW YORK STATE OPHTHALMOLOGICAL SOCIETY ET AL. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. D. C. Cir. Certiorari denied. Reported below: 272 U. S. App. D. C. 170, 854 F. 2d 1379.

No. 88–1469. AVALOS ET AL. *v.* THOMPSON ET AL. C. A. 9th Cir. Certiorari denied.

No. 88–1470. FRIGARD ET UX. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 2d 201.

No. 88–1500. LONE STAR STEEL CO. *v.* UFFELMAN. C. A. 5th Cir. Certiorari denied. Reported below: 863 F. 2d 404.

No. 88–1513. CHRISTOFFERSEN ET AL. *v.* COLLINS, MAJOR GENERAL, WASHINGTON STATE AIR NATIONAL GUARD, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 2d 1437.

No. 88–1591. SANTA FE PACIFIC REALTY CORP. *v.* CITY OF BERKELEY. C. A. 9th Cir. Certiorari denied. Reported below: 857 F. 2d 1478.

No. 88–1658. LOUISBURG GRAIN CO., INC., ET AL. *v.* CITY OF ARKANSAS CITY, KANSAS, ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 243 Kan. 627, 762 P. 2d 183.

No. 88–1665. BREWSTER *v.* MARYLAND SECURITIES COMMISSIONER. Ct. Sp. App. Md. Certiorari denied. Reported below: 76 Md. App. 722, 548 A. 2d 157.

No. 88–1674. HEALY *v.* NEW YORK LIFE INSURANCE CO. C. A. 3d Cir. Certiorari denied. Reported below: 860 F. 2d 1209.

No. 88–1702. LILVES *v.* STUART. Ct. App. Colo. Certiorari denied.

No. 88–1705. MONTROSE CHEMICAL CORPORATION OF CALIFORNIA *v.* PARR-RICHMOND TERMINAL CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 2d 344.

No. 88–1717. FASSLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 858 F. 2d 1016.

No. 88–1738. MALACHOWSKI *v.* SILVERBERG, MARVIN & SWAIM ET AL. C. A. 2d Cir. Certiorari denied.

No. 88–1743. SATTI ET AL. *v.* DORMAN. C. A. 2d Cir. Certiorari denied. Reported below: 862 F. 2d 432.

No. 88–1744. WINCHESTER & WESTERN RAILROAD CO. *v.* VIRGINIA CORPORATION COMMISSION ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 236 Va. 473, 374 S. E. 2d 66.

No. 88–1772. BUCKLES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 843 F. 2d 469.

No. 88–1799. JACKSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 88–1801. BINDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 88–6473. HAAKE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 536 So. 2d 276.

No. 88–6531. BURCH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 861 F. 2d 724.

No. 88–6598. RYAN *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–6602. CHAVEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 862 F. 2d 1436.

No. 88–6612. BOUTWELL *v.* NAGLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 861 F. 2d 1530.

No. 88–6631. FONSECA-MARTINEZ, AKA MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 857 F. 2d 1479.

No. 88–6632. BANNISTER *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 203 Cal. App. 3d 1525, 250 Cal. Rptr. 909.

No. 88–6644. PARTIDA-PARRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 2d 265.

No. 88–6654. Tippitt *v.* Lockhart, Director, Arkansas Department of Correction. C. A. 8th Cir. Certiorari denied. Reported below: 859 F. 2d 595.

No. 88–6783. Salcedo *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1421.

No. 88–6788. Smith *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 323 N. C. 703, 374 S. E. 2d 866.

No. 88–6809. Hayes *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 869 F. 2d 592.

No. 88–6841. Vasquez *v.* Lockhart, Director, Arkansas Department of Correction. C. A. 8th Cir. Certiorari denied. Reported below: 867 F. 2d 1056.

No. 88–6882. Mahone *v.* Sternweiler et al. C. A. 6th Cir. Certiorari denied. Reported below: 859 F. 2d 922.

No. 88–6899. Henry *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 2d 1419.

No. 88–6954. Johnson *v.* Spaniol, Clerk, United States Supreme Court. C. A. D. C. Cir. Certiorari denied.

No. 88–6974. Skovran *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 870 F. 2d 653.

No. 88–6987. Thompson *v.* Florida. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 537 So. 2d 582.

No. 88–6990. Holloway *v.* Pack et al. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 2d 1418.

No. 88–6993. Trainer *v.* Ylst, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 859 F. 2d 924.

No. 88–7011. Wilson *v.* Kassicieh et al. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1024.

No. 88–7015. Martin *v.* C. Itoh & Co., Inc., et al. Sup. Ct. Del. Certiorari denied. Reported below: 558 A. 2d 297.

No. 88–7022. Henderson *v.* Battle Creek Medical Education Corp. et al. C. A. 6th Cir. Certiorari denied. Reported below: 860 F. 2d 1079.

No. 88-7024. ALSTON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 554 A. 2d 304.

No. 88-7041. WHIGHAM *v.* MCNAMARA ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 2d 1434.

No. 88-7046. DEANES *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 323 N. C. 508, 374 S. E. 2d 249.

No. 88-7049. DANNENBERG *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 88-7075. LOUIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 869 F. 2d 1500.

No. 88-7099. SURBER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 870 F. 2d 656.

No. 88-7113. TOWNE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 870 F. 2d 880.

No. 88-7147. TRIPATI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88-7151. BEDOYA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 872 F. 2d 1022.

No. 88-7154. MEDRANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 2d 1499.

No. 88-7159. MOTES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 871 F. 2d 124.

No. 88-7162. BAPTISTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 2d 119.

No. 88-7163. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 869 F. 2d 592.

No. 88-7181. SOLLES *v.* ISRAEL, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 868 F. 2d 242.

No. 88-7184. CASTILLO ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 871 F. 2d 123.

No. 88-7185. HOMAYOUNI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 868 F. 2d 1268.

No. 88–7188. TOWNSEND *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 549 A. 2d 724.

No. 88–1546. PACIFIC MUTUAL LIFE INSURANCE CO. ET AL. *v.* TURNBOW. Sup. Ct. Nev. Motions of UNUM Life Insurance Co., Association of California Life Insurance Cos., and Merchants and Manufacturers Association for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 104 Nev. 676, 765 P. 2d 1160.

No. 88–1628. MILKEN ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Motions of Class Action Plaintiffs in Boesky Litigation et al. and Arden Way Associates et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 861 F. 2d 1307.

No. 88–1651. REDMAN *v.* CLARK. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 865 F. 2d 257.

No. 88–6723. NIXON *v.* MISSISSIPPI. Sup. Ct. Miss.; and
No. 88–6791. GENTRY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 88–6723, 533 So. 2d 1078; No. 88–6791, 770 S. W. 2d 780.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 88–750. GEORGE *v.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES ET AL., 488 U. S. 1008;
No. 88–1491. RHINEHART ET AL. *v.* SEATTLE TIMES ET AL., *ante*, p. 1015;
No. 88–6418. VAN LEEUWEN ET VIR *v.* MCCORKINDALE ET AL., *ante*, p. 1023;
No. 88–6572. ABNER *v.* ESCAMBIA COUNTY SCHOOL DISTRICT, PENSACOLA, FLORIDA, *ante*, p. 1024;
No. 88–6619. RIGHTER *v.* UNITED STATES STOVE CO. ET AL., *ante*, p. 1025;

No. 88–6664. JARVI *v.* SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 1025;

No. 88–6669. SELLNER *v.* HUDNALL ET AL., *ante*, p. 1025; and

No. 88–6763. IN RE WALKER, *ante*, p. 1018. Petitions for rehearing denied.

No. 84–5350. MAXWELL *v.* PENNSYLVANIA, 469 U. S. 971;

No. 88–6172. RAGHEB *v.* BLUE CROSS & BLUE SHIELD OF MICHIGAN, 489 U. S. 1027; and

No. 88–6427. HARGROVE *v.* UNITED STATES, 489 U. S. 1070. Motions for leave to file petitions for rehearing denied.

JUNE 12, 1989

Certiorari Granted—Vacated and Remanded

No. 87–1382. COMMISSIONER OF INTERNAL REVENUE *v.* STAPLES ET VIR. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hernandez* v. *Commissioner*, *ante*, p. 680. JUSTICE BRENNAN and JUSTICE KENNEDY took no part in the consideration or decision of this case. Reported below: 821 F. 2d 1324.

No. 87–1954. CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA *v.* NASH. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wards Cove Packing Co.* v. *Atonio*, *ante*, p. 642. Reported below: 837 F. 2d 1534.

No. 88–102. COMMISSIONER OF INTERNAL REVENUE *v.* FOLEY ET UX. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hernandez* v. *Commissioner*, *ante*, p. 680. JUSTICE BRENNAN and JUSTICE KENNEDY took no part in the consideration or decision of this case. Reported below: 844 F. 2d 94.

No. 88–141. USX CORP., FKA UNITED STATES STEEL CORP. *v.* GREEN ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wards Cove Packing Co.* v. *Atonio*, *ante*, p. 642. Reported below: 843 F. 2d 1511.

No. 88–1742. ADAMS ET AL. *v.* AVCO CORP. ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101 (1989). Reported below: 862 F. 2d 316.

Miscellaneous Orders

No. — ———. CALDWELL *v.* CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. — ———. IN RE MASON ET UX. Motion for leave to file petition for writ of mandamus and other relief denied.

No. — ———. PROWS *v.* SPANIOL ET AL.; and
No. — ———. PROWS *v.* UNITED STATES ET AL. Motions to direct the Clerk to file petitions for writs of certiorari without notarized affidavits in support of motions for leave to proceed *in forma pauperis* denied.

No. — ———. THOMPSON *v.* TENNESSEE. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. 111, Orig. DELAWARE *v.* NEW YORK. Motion of New York for judgment of the pleadings against Texas referred to the Special Master. Motions of Idaho, Arizona, and Alabama et al. for leave to file complaints in intervention referred to the Special Master. Motions of Connecticut, New Mexico, Tennessee, Wisconsin, Virginia, and District of Columbia for leave to intervene referred to the Special Master. [For earlier order herein, see, *e. g.*, 489 U. S. 1005.]

No. A–965 (88–1178). KEANE *v.* UNITED STATES, *ante*, p. 1084. Application to suspend the effect of the order denying certiorari, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. JUSTICE STEVENS took no part in the consideration or decision of this application.

No. D–791. IN RE DISBARMENT OF KROWEN. It is ordered that Jerril J. Krowen, of Boston, Mass., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 87–1979. CHESAPEAKE & OHIO RAILWAY CO. *v.* SCHWALB ET AL.; and

No. 88–127. NORFOLK & WESTERN RAILWAY CO. *v.* GOODE. Sup. Ct. Va. [Certiorari granted, 489 U. S. 1009.] Motion of respondents for divided argument denied.

No. 88–42. HALLSTROM ET UX. *v.* TILLAMOOK COUNTY. C. A. 9th Cir. [Certiorari granted, 489 U. S. 1077.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88–1000. NEW YORK *v.* HARRIS. Ct. App. N. Y. [Certiorari granted, *ante*, p. 1018.] Motion of respondent for leave to proceed *in forma pauperis* granted. Motion of respondent to dismiss writ as improvidently granted denied.

Certiorari Granted

No. 87–2048. TEXACO INC. *v.* HASBROUCK, DBA RICK'S TEXACO, ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 842 F. 2d 1034.

No. 88–1480. REVES ET AL. *v.* ARTHUR YOUNG & CO. C. A. 8th Cir. Certiorari granted. Reported below: 856 F. 2d 52.

Certiorari Denied

No. 87–2056. YESHIVA UNIVERSITY *v.* SOBEL. C. A. 2d Cir. Certiorari denied. Reported below: 839 F. 2d 18.

No. 88–206. TUCKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 836 F. 2d 334.

No. 88–520. ROBINSON *v.* ADAMS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 847 F. 2d 1315.

No. 88–699. INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, AFL–CIO *v.* BERGER ET AL.; and

No. 88–820. IRON WORKERS REINFORCED RODMEN, LOCAL 201 *v.* BERGER ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 269 U. S. App. D. C. 67, 843 F. 2d 1395, and 271 U. S. App. D. C. 321, 852 F. 2d 619.

No. 88–797. VINCENT *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 755 S. W. 2d 400.

No. 88–897. ASHENBAUGH ET AL. *v.* CRUCIBLE INC. 1975 SALARIED RETIREMENT PLAN. C. A. 3d Cir. Certiorari denied. Reported below: 854 F. 2d 1516.

No. 88–1398. LUMAR MARINE, INC. *v.* SIMEON ET AL.; and
No. 88–1462. T. SMITH & SONS, INC. *v.* SIMEON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 852 F. 2d 1421.

No. 88–1404. MONSANTO CO. ET AL. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 858 F. 2d 160.

No. 88–1454. BARNES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 859 F. 2d 926.

No. 88–1455. HATTEN *v.* RAINS, SECRETARY OF STATE OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 854 F. 2d 687.

No. 88–1465. GREGORY TIMBER RESOURCES, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 855 F. 2d 841.

No. 88–1479. INTERNATIONAL MILL SERVICE ET AL. *v.* AUBUSCHON. Sup. Ct. Ill. Certiorari denied. Reported below: 123 Ill. 2d 555, 530 N. E. 2d 976.

No. 88–1481. OEN YIN-CHOY *v.* ROBINSON, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 858 F. 2d 1400.

No. 88–1532. HAZARDOUS WASTE TREATMENT COUNCIL *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. (two cases). C. A. D. C. Cir. Certiorari denied. Reported below: 274 U. S. App. D. C. 44, 861 F. 2d 277 (first case); 275 U. S. App. D. C. 232, 866 F. 2d 433 (second case).

No. 88–1548. BATES *v.* TENNESSEE VALLEY AUTHORITY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 851 F. 2d 1366.

No. 88–1552. WASHINGTON INTERNATIONAL INSURANCE CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 863 F. 2d 877.

No. 88–1567. CAMARENA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 863 F. 2d 880.

No. 88–1582. O'CARROLL *v.* CHAPARRAL AIRLINES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 863 F. 2d 11.

No. 88-1586. JACKSON *v.* LIQUID CARBONIC CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 863 F. 2d 111.

No. 88-1619. ALABAMA DEPARTMENT OF EDUCATION ET AL. *v.* POWERS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 854 F. 2d 1285.

No. 88-1654. CALIFORNIA *v.* FARMER. Sup. Ct. Cal. Certiorari denied. Reported below: 47 Cal. 3d 888, 765 P. 2d 940.

No. 88-1687. DOOLEY *v.* FORT WORTH INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 2d 1418.

No. 88-1689. COVINGTON *v.* SAPPINGTON. Ct. App. N. M. Certiorari denied. Reported below: 108 N. M. 155, 768 P. 2d 354.

No. 88-1690. GREATER BUFFALO PRESS, INC., ET AL. *v.* FEDERAL RESERVE BANK OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 866 F. 2d 38.

No. 88-1691. STERLING DRUG INC. *v.* CIRCUIT COURT FOR MILWAUKEE COUNTY ET AL. Sup. Ct. Wis. Certiorari denied.

No. 88-1694. MURPHY *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 28 M. J. 232.

No. 88-1697. HAJOCA CORP. *v.* HEROLD. C. A. 4th Cir. Certiorari denied. Reported below: 864 F. 2d 317.

No. 88-1699. CULLEN *v.* PAINE, WEBBER, JACKSON & CURTIS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 863 F. 2d 851.

No. 88-1703. SHAPERO *v.* KENTUCKY BAR ASSN. Sup. Ct. Ky. Certiorari denied. Reported below: 763 S. W. 2d 126 and 767 S. W. 2d 323.

No. 88-1704. LEUCADIA, INC. *v.* RELIANCE INSURANCE CO. C. A. 2d Cir. Certiorari denied. Reported below: 864 F. 2d 964.

No. 88-1707. ZIMMERMANN *v.* BOARD OF PROFESSIONAL RESPONSIBILITY. Sup. Ct. Tenn. Certiorari denied. Reported below: 764 S. W. 2d 757.

No. 88-1709. POTTER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 88–1712. REARDON ET AL. *v.* REARDON ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 275 U. S. App. D. C. 230, 865 F. 2d 1329.

No. 88–1714. MILLER *v.* PUBLISHERS PAPER CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 861 F. 2d 268.

No. 88–1716. BERGER *v.* SUPREME COURT OF OHIO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 861 F. 2d 719.

No. 88–1726. DOE ET AL. *v.* HENNEPIN COUNTY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 858 F. 2d 1325.

No. 88–1729. RODRIGUEZ *v.* DANT OF ARIZONA ET AL. Ct. App. Ariz. Certiorari denied.

No. 88–1732. CRIST *v.* ADDUCI, COMMISSIONER, NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 868 F. 2d 1267.

No. 88–1739. ORN *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 88–1755. DWIGHT'S DISCOUNT VACUUM CLEANER CITY, INC. *v.* SCOTT FETZER CO., KIRBY COMPANY DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 860 F. 2d 646.

No. 88–1766. FOLTZ ET AL. *v.* U. S. NEWS & WORLD REPORT, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 275 U. S. App. D. C. 145, 865 F. 2d 364.

No. 88–1768. HEIM *v.* HIGH PLAINS AGRICULTURAL CREDIT CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 871 F. 2d 1093.

No. 88–1776. ADKINS, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ADKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 869 F. 2d 593.

No. 88–1779. S. E. NICHOLS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 862 F. 2d 952.

No. 88–1795. AHMAD ET AL. *v.* RAYNOR, ADMINISTRATOR, MARYLAND STATE ADMINISTRATIVE BOARD OF ELECTION LAWS. C. A. 4th Cir. Certiorari denied. Reported below: 862 F. 2d 313.

No. 88–1809. VADEN *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 768 P. 2d 1102.

No. 88–1811. MAJOR *v.* PENNWELL PUBLISHING CO. C. A. 10th Cir. Certiorari denied.

No. 88–1812. DENNARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 861 F. 2d 1278.

No. 88–1822. OATES ET AL. *v.* OATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 866 F. 2d 203.

No. 88–1827. BONSER ET AL. *v.* TOWN OF NOTTINGHAM, NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 131 N. H. 120, 552 A. 2d 58.

No. 88–1831. HOWARD, AKA BEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 1260.

No. 88–1834. PENNZOIL CO. ET AL. *v.* KESTENBAUM. Sup. Ct. N. M. Certiorari denied. Reported below: 108 N. M. 20, 766 P. 2d 280.

No. 88–1836. HENRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 869 F. 2d 595.

No. 88–1838. KELLERMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 871 F. 2d 1363.

No. 88–1839. ROMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 870 F. 2d 65.

No. 88–1843. ROGGIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 863 F. 2d 41.

No. 88–1846. DELGEORGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 870 F. 2d 652.

No. 88–1856. LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT *v.* NICK MARTINOLICH, INC., ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 532 So. 2d 435.

No. 88–5159. JACKSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 322 N. C. 251, 368 S. E. 2d 838.

No. 88–5373. CAPERS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 88–5381. WASHINGTON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 88–5874. SMITH *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 755 S. W. 2d 248.

No. 88–6416. SPLUNGE *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 526 N. E. 2d 977.

No. 88–6484. TORRES *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied. Reported below: 836 F. 2d 1340.

No. 88–6519. SANDERS *v.* ROBINSON. C. A. 9th Cir. Certiorari denied. Reported below: 864 F. 2d 630.

No. 88–6740. DAVIS ET AL. *v.* MONSANTO CHEMICAL CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 858 F. 2d 345.

No. 88–6769. RISK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1422.

No. 88–6798. SAGER *v.* MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 88–6822. MERCER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 853 F. 2d 630.

No. 88–6843. PALMER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 864 F. 2d 524.

No. 88–6879. CLEMMONS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 793.

No. 88–6885. BURTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 866 F. 2d 1057.

No. 88–6959. MENARD *v.* COUNTY OF HENRICO, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 857 F. 2d 1469.

No. 88-6977. JOHNSON *v.* DEPARTMENT OF JUSTICE. C. A. Fed. Cir. Certiorari denied. Reported below: 864 F. 2d 149.

No. 88-7014. GRIFFITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 864 F. 2d 421.

No. 88-7051. POGUE *v.* COLUMBIA COUNTY. Ct. App. Wis. Certiorari denied. Reported below: 147 Wis. 2d 882, 434 N. W. 2d 622.

No. 88-7054. BROWN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 88-7057. RUSCITTI *v.* ESTATE OF RUSCITTI. Super. Ct. Pa. Certiorari denied. Reported below: 377 Pa. Super. 664, 541 A. 2d 1159.

No. 88-7058. THEOPHILE *v.* PHILLIPS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 793.

No. 88-7060. RODMAN *v.* WILSON, DIRECTOR, DEPARTMENT OF REHABILITATION AND CORRECTION. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 260.

No. 88-7063. BOYD *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 189 Ga. App. 617, 377 S. E. 2d 11.

No. 88-7065. BARNES *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 793.

No. 88-7066. SCOTT *v.* KEMNA, SUPERINTENDENT, WESTERN MISSOURI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 862 F. 2d 1311.

No. 88-7067. BAISDEN *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1488.

No. 88-7071. CUMMINGS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 862 F. 2d 1504.

No. 88-7072. BLACK *v.* CALIFORNIA. Ct. App. Cal. 1st App. Dist. Certiorari denied.

No. 88–7077. SELIN *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 94 Ore. App. 566, 767 P. 2d 119.

No. 88–7078. NICHOLS *v.* TANSY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 867 F. 2d 1250.

No. 88–7093. CORBIT *v.* MERCER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1489.

No. 88–7096. TOSTE *v.* MEACHUM, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. C. A. 2d Cir. Certiorari denied. Reported below: 861 F. 2d 782.

No. 88–7122. FLYNN *v.* COUNTY OF NASSAU ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 873 F. 2d 1435.

No. 88–7130. KESSLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 864 F. 2d 790.

No. 88–7166. DUPARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 861 F. 2d 269.

No. 88–7167. JACK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 868 F. 2d 1186.

No. 88–7168. GIBSON-BEY, AKA GIBSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 88–7171. MAY *v.* HACKETT. C. A. 6th Cir. Certiorari denied. Reported below: 863 F. 2d 883.

No. 88–7173. WELCH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–7183. BLANTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 2d 689.

No. 88–7189. RONDON-MOLINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 2d 299.

No. 88–7191. PETERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1422.

No. 88–7196. WHITE, AKA WOODS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 869 F. 2d 822.

No. 88–7198. WEICHERT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 873 F. 2d 1436.

No. 88–7200. IRVING, AKA OWENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 88–7205. CAMPBELL *v.* STRONG ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 1267.

No. 88–7209. ZOLICOFFER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 869 F. 2d 771.

No. 88–7210. CARDONA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 819.

No. 88–7211. GONZALEZ-QUESADA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 431.

No. 88–7213. ELLIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 276 U. S. App. D. C. 409, 871 F. 2d 1149.

No. 88–7215. TOWNSEND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 2d 118.

No. 88–7216. BROCK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1423.

No. 88–7219. SCHMIDT *v.* HILLCREST HOSPITAL ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 88–7223. CARTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 2d 1419.

No. 87–1449. MILLER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 829 F. 2d 500.

No. 87–2023. CHRISTIANSEN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 843 F. 2d 418.

No. 87–7107. SLAUGHTER *v.* KENTUCKY. Sup. Ct. Ky.;
No. 88–5241. HOWARD *v.* SOUTH CAROLINA. Sup. Ct. S. C.;
No. 88–5863. GRIFFIN *v.* MISSOURI. Sup. Ct. Mo.;
No. 88–6756. EVANS *v.* ILLINOIS. Sup. Ct. Ill.;

No. 88-7124. RICHARDSON *v.* JOHNSON, WARDEN, ET AL. C. A. 11th Cir.; and

No. 88-7235. GILMORE *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: No. 87-7107, 744 S. W. 2d 407; No. 88-5241, 295 S. C. 462, 369 S. E. 2d 132; No. 88-5863, 756 S. W. 2d 475; No. 88-6756, 125 Ill. 2d 50, 530 N. E. 2d 1360; No. 88-7124, 864 F. 2d 1536; No. 88-7235, 861 F. 2d 1061.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 87-7298. SCOTT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 751 P. 2d 758.

No. 88-36. BENEFICIAL CORP. ET AL. *v.* DEUTSCHMAN. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 841 F. 2d 502.

No. 88-1379. TINDLE *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner to strike the brief of the Solicitor General denied. Certiorari denied. Reported below: 860 F. 2d 125.

No. 88-1461. CHRISTY ET AL. *v.* LUJAN, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 857 F. 2d 1324.

JUSTICE WHITE, dissenting.

Petitioner Christy is a herder who grazed his sheep on leased land near Glacier National Park. Between July 1 and July 9, 1982, grizzly bears from the park killed 20 of Christy's sheep. Requests for assistance from park rangers yielded no results, and efforts to frighten away the bears were unsuccessful. On July 9, when two grizzlies emerged from the forest and approached Christy's sheep, he shot and killed a bear. Grizzlies, however, are an "endangered species"; Christy's killing of the bear thus violated the Endangered Species Act, which makes it unlawful to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" grizzlies and other animals protected by the statute. 16 U. S. C.

§§ 1538(a)(1), 1532(19). Christy was consequently assessed a $2,500 penalty for shooting the bear.

Christy then filed this action in District Court, seeking to enjoin enforcement of the Act against herders like himself, and resisting payment of the $2,500 penalty. Christy claimed, *inter alia*, that his actions in defense of his livestock were protected by the Due Process Clause of the Fifth Amendment; alternatively, Christy contended that the Act resulted in an uncompensated "taking" of his property. Both the District Court and the Ninth Circuit rejected these claims, and this petition ensued.

I would grant the petition for certiorari to consider Christy's constitutional claims. Christy's claim of a constitutional right to defend his property is not insubstantial. The right to defend one's property has long been recognized at common law, see W. Blackstone, Commentaries *138–140, and is deeply rooted in the legal traditions of this country, see, *e. g.*, *Beard* v. *United States*, 158 U. S. 550, 555 (1895). Having the freedom to take actions necessary to protect one's property may well be a liberty "deeply rooted in this Nation's history and tradition," *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977) (opinion of Powell, J.), and, therefore, entitled to the substantive protection of the Due Process Clause. In any event, Christy's claim to such protection presents an interesting and important question—the proper resolution of which is not altogether clear—that merits plenary review.

Even more substantial is Christy's claim that the Endangered Species Act operates as a governmental authorization of a "taking" of his property; leaving him uncompensated for this taking violates the Fifth Amendment, Christy contends. There can be little doubt that if a federal statute authorized park rangers to come around at night and take Christy's livestock to feed the bears, such a governmental action would constituted a "taking." The Court of Appeals below, and the federal parties in their submission here, distinguish such a case from this one, by noting that the United States "does not 'own' the wild animals it protects, nor does the government control the conduct of such animals." *Christy* v. *Hodel*, 857 F. 2d 1324, 1335 (CA9 1988); see Brief in Opposition 7.

Perhaps not; but the Government does make it unlawful for Christy to "harass, harm, [or] pursue" such animals when they come to take his property—and perhaps a Government edict barring one from resisting the loss of one's property is the constitutional equivalent of an edict taking such property in the first place. Thus, if the Government decided (in lieu of the food stamp program) to enact a law barring grocery store owners from "harassing, harming, or pursuing" people who wish to take food off grocery shelves without paying for it, such a law might well be suspect under the Fifth Amendment. For similar reasons, the Endangered Species Act may be suspect as applied in Christy's case.

In sum, sustaining grizzly bears is a worthwhile and important governmental objective. But it "is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 318–319 (1987) (quoting *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960)). Here, Christy has been asked to bear the burden of feeding endangered grizzlies—or at the least, has been estopped from taking measures necessary to prevent the use of his property for this purpose. Thus, it seems quite possible that Christy has been denied the Fifth Amendment's protection against uncompensated takings.

Because I think that Christy's constitutional claims present interesting and important questions that merit our attention, I dissent from the Court's denial of review in this case.

No. 88–1686. COLORADO DEPARTMENT OF SOCIAL SERVICES *v.* OBERT. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 766 P. 2d 1186.

No. 88–1692. ASSOCIATED BUILDERS, INC., ET AL. *v.* MEIGGS ET AL. Ct. App. D. C. Motions of National Association of Minority Contractors and Washington Metropolitan Area Transit Authority for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 545 A. 2d 631.

No. 88–1711. PRUESSMAN *v.* LEWIS ET AL. C. A. 11th Cir. Motion of petitioner to strike brief in opposition of respondents City of Coral Gables et al. denied. Certiorari denied. Reported below: 865 F. 2d 1272.

No. 88–1733. SOUTHERN BELL TELEPHONE & TELEGRAPH CO. *v.* STAMEY. C. A. 11th Cir. Certiorari denied. JUSTICE

O'CONNOR took no part in the consideration or decision of this petition. Reported below: 859 F. 2d 855.

Rehearing Denied

No. 87–7052. FLEMING *v.* ZANT, WARDEN, *ante,* p. 1028;

No. 88–1235. BOINEAU *v.* UNITED STATES ET AL., 489 U. S. 1055;

No. 88–1407. DOLENZ *v.* STUART YACHT BUILDERS, INC., *ante,* p. 1021;

No. 88–1509. PATTON *v.* UNITED STATES RAILROAD RETIREMENT BOARD, *ante,* p. 1022;

No. 88–6675. WOODWARD *v.* MISSISSIPPI, *ante,* p. 1028;

No. 88–6848. LAWS *v.* ARMONTROUT, WARDEN, *ante,* p. 1040; and

No. 88–6888. SANDERS *v.* UNITED STATES ET AL., *ante,* p. 1072. Petitions for rehearing denied.

No. 88–6599. MASON *v.* PARKE, WARDEN, *ante,* p. 1009. Motion for leave to file petition for rehearing denied.

AMENDMENTS TO BANKRUPTCY RULES

The following amendment to the Bankruptcy Rules was prescribed by the Supreme Court of the United States on April 25, 1989, pursuant to 28 U. S. C. § 2075, and was reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1120. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter.

For earlier publication of Bankruptcy Rules and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, and 480 U. S. 1077.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 1989

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress an amendment to the Bankruptcy Rules which has been adopted by the Supreme Court pursuant to Section 2075 of Title 28, United States Code.

Accompanying this rule is an excerpt from the report of the Judicial Conference of the United States containing the Advisory Committee Note submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 25, 1989

ORDERED:

1. That the Bankruptcy Rules be, and they hereby are, amended by including therein an amendment to Bankruptcy Rule 9006(a) as hereinafter set forth:

[See *infra*, p. 1123.]

2. That the foregoing change in the Bankruptcy Rules shall take effect on August 1, 1989 and shall govern all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings in bankruptcy cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendment to the Bankruptcy Rules in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO BANKRUPTCY RULES

Rule 9006. Time.

(*a*) *Computation.*—In computing any period of time prescribed or allowed by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 8 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 5001(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the bankruptcy court is held.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 25, 1989, pursuant to 28 U. S. C. § 2072, and, except as noted below, were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1126. The Judicial Conference Report referred to in that letter is not reproduced herein.

On May 1, 1989, THE CHIEF JUSTICE reported to Congress corrections to the previously transmitted Rules, whereby "in appeals from bankruptcy appellate panels;" was added to Rule 1(a), and "corporate disclosure statement," was added to Rule 28(g).

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Appellate Procedure and the amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, and 475 U. S. 1153.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 1989

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Appellate Procedure which have been adopted by the Supreme Court pursuant to Title 28, United States Code, Section 2072.

Accompanying these rules are excerpts from the reports of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Title 28, United States Code, Section 331.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 25, 1989

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 1(a), 3(a), 26(a), 27(a), 28(g) and new Rules 6 and 26.1, and a new Form 5 as hereinafter set forth:

[See *infra*, pp. 1129–1134.]

2. That the foregoing additions to and changes in the Federal Rules of Appellate Procedure, shall take effect on December 1, 1989, and shall govern all proceedings in appellate actions thereafter commenced and, insofar as just and practicable, all proceedings in appellate actions then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing additions to and changes in the rules of appellate procedure in accordance with the provisions of Section 2072 of Title 18, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 1. Scope of rules.

(*a*) *Scope of rules.*—These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the United States Tax Court; in appeals from bankruptcy appellate panels; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.

. . . . .

Rule 3. Appeal as of right—how taken.

(*a*) *Filing the notice of appeal.*—An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U. S. C. § 1292(b) and appeals in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

. . . . .

Rule 6. Appeals in bankruptcy cases from final judgments and orders of district courts or of bankruptcy appellate panels.

(*a*) *Appeal from a judgment, order or decree of a district court exercising original jurisdiction in a bankruptcy case.*— An appeal to a court of appeals from a final judgment, order or decree of a district court exercising jurisdiction pursuant to 28 U. S. C. § 1334 shall be taken in identical fashion as appeals from other judgments, orders or decrees of district courts in civil actions.

(*b*) *Appeal from a judgment, order or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case.*—

(*1*) *Applicability of other rules.* All provisions of these rules are applicable to an appeal to a court of appeals pursuant to 28 U. S. C. § 158(d) from a final judgment, order or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction pursuant to 28 U. S. C. § 158(a) or (b); except that:

(i) Rules 3.1, 4(a)(4), 4(b), 5.1, 9, 10, 11, 12(b), 13–20, 22–23, and 24(b) are not applicable;

(ii) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" shall be read as a reference to Form 5; and

(iii) when the appeal is from a bankruptcy appellate panel, the term "district court" as used in any applicable rule, means "appellate panel."

(*2*) *Additional rules.* In addition to the rules made applicable by subsection (b)(1) of this rule, the following rules shall apply to an appeal to a court of appeals pursuant to 28 U. S. C. § 158(d) from a final judgment, order or decree of a district court or of a bankruptcy appellate panel exercising appellate jurisdiction pursuant to 28 U. S. C. § 158(a) or (b):

(i) Effect of motion for rehearing on time for appeal. If a timely motion for rehearing under Bankruptcy Rule 8015 is filed in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties shall run from the entry of the order denying the rehearing or the entry of the subsequent judgment.

(ii) The Record on Appeal. Within 10 days after filing the notice of appeal, the appellant shall file with the clerk possessed of the record assembled pursuant to Bankruptcy Rule 8006, and serve on the appellee, a statement of the issues to be presented on appeal and a designation of the record to be certified and transmitted to the clerk of the court of appeals. If the appellee deems other parts of the record necessary, the appellee shall, within 10 days after service of the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included. The record, redesignated as provided above, plus the proceedings in the district court or bankruptcy appellate panel and a certified copy of the docket entries prepared by the clerk pursuant to Rule 3(d) shall constitute the record on appeal.

(iii) Transmission of the record. When the record is complete for purpose of the appeal, the clerk of the district court or the appellate panel, shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court or of the appellate panel shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerk for the transportation and receipt of exhibits of unusual bulk or weight. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record. The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the redesignated record, subject to the right of any party to request at any time during the pendency of the appeal that the redesignated record by transmitted.

(iv) Filing of the record. Upon receipt of the record, the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed. Upon receipt of a certified copy of the docket entries transmitted in lieu of the redesignated record pursuant to rule or order, the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.

Rule 26. Computation and extension of time.

(*a*) *Computation of time.*—In computing any period of time prescribed or allowed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible, in which event the period runs until the end of the next day which in not one of the aforementioned days. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.

* * * * *

Rule 26.1. Corporate disclosure statement.

Any non-governmental corporate body party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case shall file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. The statement shall be filed with a party's principal brief or upon filing a motion, response, petition or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. The statement shall be included in front of the table of contents in a party's principal brief even if the statement was previously filed.

Rule 27. Motions.

(*a*) *Content of motions; response.*—Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

* * * * *

Rule 28. Briefs.

* * * * *

(*g*) *Length of briefs.*—Except by permission of the court, or as specified by local rule of the court of appeals, principal briefs shall not exceed 50 pages, and reply briefs shall not ex-

ceed 25 pages, exclusive of pages containing the corporate disclosure statement, table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc.

. . . . .

FORM 5. NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT OR A BANKRUPTCY APPELLATE PANEL

United States District Court for the ....
District of ....

In re	)	
	)	
....................................,	)	
Debtor	)	
	)	
....................................,	)	File No. ....
Plaintiff	)	
	)	
v.	)	
	)	
....................................,	)	
Defendant	)	

Notice of Appeal to
United States Court of Appeals for the .... Circuit

.........................., the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the .... Circuit from the final judgment [or order or decree] of the district court for the district of .... [or bankruptcy appellate panel of the .... circuit], entered in this case on ...., 19.... [here describe the judgment, order, or decree] ....

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated ....

Signed ....
Attorney for Appellant

Address: ....

....

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 25, 1989, pursuant to 28 U. S. C. § 2072, and were reported to Congress by The Chief Justice on the same date. For the letter of transmittal, see *post*, p. 1136. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure, and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, and 485 U. S., Pt. 3, p. 1057.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 1989

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Criminal Procedure which have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the reports of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 25, 1989

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 11(c), 32(a) and (c), 32.1(a) and (b), 40(d) and 41(e) as hereinafter set forth:

[See *infra*, pp. 1139–1144.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1989 and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas.

*   *   *   *   *

(*c*) *Advice to defendant.*—Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

*   *   *   *   *

Rule 32. Sentence and judgment.

(*a*) *Sentence.*

(*1*) *Imposition of sentence.*—Sentence shall be imposed without unnecessary delay, but the court may, when there is a factor important to the sentencing determination that is not then capable of being resolved, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Prior to the sentencing hearing, the court shall provide the counsel for the defendant and the attorney for the Government with notice of the probation officer's determination, pursuant to the provisions of subdivision (c)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government and opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence. Before imposing sentence, the court shall also—

(A) determine that the defendant and defendant's counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

(B) afford counsel for the defendant an opportunity to speak on behalf of the defendant; and

(C) address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence.

The attorney for the Government shall have an equivalent opportunity to speak to the court. Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the Government.

(2) *Notification of right to appeal.*—After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

* * * * *

(*c*) *Presentence investigation.*

(*1*) *When made.*—A probation officer shall make a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U. S. C. §3553, and the court explains this finding on the record.

Except with the written consent of the defendant, the report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty.

(*2*) *Report.*—The report of the presentence investigation shall contain—

(A) information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant.

. . . . .

(*3*) *Disclosure.*

(A) At least 10 days before imposing sentence, unless this minimum period is waived by the defendant, the court shall provide the defendant and the defendant's counsel with a copy of the report of the presentence investigation, including the information required by subdivision (c)(2) but not including any final recommendation as to sentence, and not to the extent that in the opinion of the court the report contains diagnostic opinions, which if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm; physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

. . . . .

(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons pursuant to 18 U. S. C. § 3552(b) shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

. . . . .

Rule 32.1. Revocation or modification of probation or supervised release.

(*a*) *Revocation of probation or supervised release.*

(*1*) *Preliminary hearing.*—Whenever a person is held in custody on the grounds that the person has violated a condition of probation or supervised release, the person shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given authority pursuant to 28 U. S. C. § 636 to conduct such hearings, in order to determine whether there is probable cause to hold the person for a revocation hearing. The person shall be given

(A) notice of the preliminary hearing and its purpose and of the alleged violation;

(B) an opportunity to appear at the hearing and present evidence in the person's own behalf;

(C) upon request, the opportunity to question witnesses against the person unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and

(D) notice of the person's right to be represented by counsel.

The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to exist, the person shall be held for a revocation hearing. The person may be released pursuant to Rule 46(c) pending the revocation hearing. If probable cause is not found to exist, the proceeding shall be dismissed.

(*2*) *Revocation hearing.*—The revocation hearing, unless waived by the person, shall be held within a reasonable time in the district of jurisdiction. The person shall be given

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear and present evidence in the person's own behalf;

(D) the opportunity to question adverse witnesses; and

(E) notice of the person's right to be represented by counsel.

(*b*) *Modification of probation or supervised release.*—A hearing and assistance of counsel are required before the terms or conditions of probation or supervised release can be modified, unless the relief to be granted to the person on probation or supervised release upon the person's request or the court's own motion is favorable to the person, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation or supervised release is not favorable to the person for the purposes of this rule.

Rule 40. Commitment to another district.

. . . . .

(*d*) *Arrest of probationer or supervised releasee.*—If a person is arrested for a violation of probation or supervised release in a district other than the district having jurisdiction, such person shall be taken without unnecessary delay before the nearest available federal magistrate. The federal magistrate shall:

(1) Proceed under Rule 32.1 if jurisdiction over the person is transferred to that district;

(2) Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either (i) hold

the person to answer in the district court of the district having jurisdiction or (ii) dismiss the proceedings and so notify that court; or

(3) otherwise order the person held to answer in the district court of the district having jurisdiction upon production of certified copies of the judgment, and warrant, and the application for the warrant, and upon a finding that the person before the magistrate is the person named in the warrant.

. . . . .

Rule 41. Search and seizure.

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(*e*) *Motion for return of property.*—A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

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